Edinburgh, March 18. 1684.

IT is ordered by the Lords of His *Majeſties* moſt honourable Privy Council, That none ſhall Re-Print, or Import into this Kingdom, the Book intituled, *The Inſtitutions of the Lawe of SCOTLAND*; by Sir *George Mackenzie* of *Roſebaugh*, His *Majeſties* Advocate, for the ſpace of nineteen years, after the date hereof, without the conſent of the Authour; under the pain of confiſcation of the whole Copies, and further puniſhment as the Council ſhall think fit.

Extracted by me
Pat. Menzies, Cls. Sti. Cli.

The which Act of Council, with all the Clauſes therein contained, the ſaid Lord Advocat doth hereby aſſign in favours of *Thomas Broun*, his Heirs or Aſſigneys.

G. M.

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THE

INSTITUTIONS

OF THE

LAW

OF

SCOTLAND.

By Sir *George Mackenzie* of *Roſehaugh*.
His MAJESTIES *Advocate*.

The Second Edition, Corrected and Enlarged by the Author.

EDINBURGH,
Printed by *John Reid*, for *Thomas Broun*, and are to be ſold at his Shop. Anno *DOM.* 1688.

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REGIA. 1715.
GEORGIUS D.G. MAG. BR. FR. ET HIB. REX F.D.
J. Pine
sculp

496.54

To the EARL of

MIDLETON,

My Lord,

THE *Natural way of Learning all Arts and Sciences, is to know, First, the Terms used in them, and the Principles upon which they are founded, with the Origins of the one, and the Reasons of the other. A Collection of these Terms and Principles is in Law called,* Institutions; *And the Natural and easie way of Writing these, is by going from the first Principle to a*

ſecond, and from that to a third: The admir'd Method of Euclid *in his Elements, though much neglected by all, who have written* Inſtitutions of Law; *in which, not only many things unneceſſary are inſerted, as almoſt all the third book of* Juſtinians Inſtitutions; *the Differences betwixt the* Sabiniani *and* Proculiani, &c. *Many Fundamental Titles are omitted, as all the matter of* Reſtitutions: *And many things are taught in the firſt Book, which cannot be underſtood till the fourth be read.*

I have therefore in theſe my Inſtitutions *treated if nothing ſave Terms and Principles, leaving out nothing that is neceſſary, and inſerting nothing that is contraverted; in all which I have proceeded, building alwayes one Principle upon another; and expreſſing every thing in the Terms of the* Civil Law, *or in the Stile of Ours reſpectively; ſo that*

that if any Man underſtand fully this Little Book; *Natural Reaſon, and Thinking, will eaſily ſupply much of what is diffuſed, through Our many Volums of Treatiſes, and Diciſions; Whereas tho ſtudying thoſe, would not in many years give a true Idea of Our Law; and does rather diſtract than inſtruct. And I have often obſerved, that moe* Lawyers *are ignorant for not underſtanding the firſt Principles, than for not having read many Books; As it is not much ryding but the ryding in the known road, which brings a Man to his Lodging ſoon, and ſecurely.*

My Lord, You obſerv'd very juſtly to me, that Inſtitutions *are a* Grammer; *and therefore, (which is a great encouragement to all Readers of* Inſtitutions, *) they who underſtand the* Inſtitutions *of any one Nation, will ſoon learn the Law of any other: For though Terms,*

Forms, and Cuſtoms differ; yet the great Principles of Juſtice and Equity are the ſame in all Nations. I ſend mine therefore to your Lordſhip, not becauſe you need them, but that you may judge, if my Inſtitutions *will be able to juſtifie your Parallel; Nor find I greater reaſon for changing my Patron in this Second Edition, than for changing the Principles laid down in the* Inſtitutions, *which I formerly preſented to you.*

Nec Phœbo gratior ulla eſt;
Quam ſibi quæ *Vari* præſcripſit pagina Nomen.

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THE

ADVERTISEMENT

THe Author having considered, that the first Impression was Printed by a blotted copie, in write and that some Notes upon papers a part, had either fallen by, or were misplaced, to which he had not leasure to advert; Because the Book was Printed in time of Session; and when the Author was likewise much diverted by pubick Imployment. He therefore thought it necessar, to give this second Edition (the first being now quite spent,) in which he has employed his last care in correcting this Impression, wherein several things are corrected, and many necessar things added.

THE

THE

INSTITUTIONS of the Law of SCOTLAND.

BOOK FIRST.

TITLE I.

Of LAWS in General.

JUSTICE, *is a constant and perpetual Will, and Inclination to give every Man what is due to him.* Justice.

LAW, is the *Science* which teacheth us to do *Justice.* Law.

This Law, in a large acceptation, is divided, in the Law *of Nature*; Law *of Nations*; And the *Civil*, and *Municipal* Law of each particular Country. Division of Law.

Book 1. Tit. 1.

The *Law of Nature* comprehends those *Dictats*, which *Nature hath taught all living Creatures*, instances whereof are *Self Defence*, *Education of Children*: and generally, all *those common principles, which are common to Man, and beasts, and this is* rather *innate instinct*, than *positive Law.*

Law of Nations

The *Law of Nations*, is peculiar to *Man-kind onely*, *dictated by right Reason*, and is divided into the *Original* and *primarie Law of Nature*, that *flows* from the *first* and *purest principles* of *right Reason*; Such as *Reverence* to GOD, *respect to our Country*, and *Parents*. And the *secundarie*, and *consequential Law of Nature*, *consisting of these general conclusions, in which ordinarly all Nations agree*, and which they draw by way of necessary

Book 1. Tit. 1.

fary conſequence, *from thoſe firſt principles*. And under this part of the Law of Nations, are comprehended, the *Obligations* ariſing from *promiſes*, or *contracts*, The *liberties* of *Commerce*, the *ranſoming* of *Priſoners*, *ſecuritie* of *Ambaſſadours*, and the like.

Municipal Law.

Civil, or *Municipal Laws*, *are the particular Laws, and Cuſtomes of every Nation*, or *people*, *who are under one Soveraign Power.*

Roman Law.

The *Romans*, having ſtudied with great exactneſs, the principles of Equity, and Juſtice. Their Emperour *Juſtinian*, did cauſe digeſt all their Laws into one body, which is now called by moſt polit Nations, (for its *Excellency*) the *Civil Law*; And as this Civil Law is much reſpected generally, ſo it has great influence in *Scotland*, except where Our own expreſs

Book 1. Tit. 1. Laws, or Cuſtomes, have receded from * it. And by the common Law in our Acts of Parliament is meant the *Civil Law* of the *Romans*.

*K. J. 6 Par. 8. Act 131

*K. Ja. 4 Par. 4. Act 51. K. Jam. 5. Par. 6 Act 80. Q. Mary Par. 5. Act 22. K. Ja. 6 Par. 1. Act. 31.

The *Popes of Rome*, in Imitation of the *Civil Law*, made a body of Law, of their own; which, becauſe *Eccleſiaſtick Laws* are called *Canons*, it was called, *The Canon Law* *; And though it has here no poſitive Authoritie, eſpecially ſince the Reformation; as being compiled by private Perſons, at the deſire of the Popes, yet our *Eccleſiaſtick Rights*, were ſettled thereby before the Reformation: And becauſe many things in that *Law*, were founded upon *material juſtice*, and exactlie calculated for all Church men; Therefore, that Law is yet much reſpected among us, Eſpecially in what relates to

Canon Law.

con-

Conſcience, *and Eccleſiaſtick Rights.* Book 1. Tit. 1.

Our *Municipal Law* of *Scotland*, is made up partly of our *written*, and partly of our *unwritten Law*: Our *written Law* comprehends, firſt, our *Statutory Law*, which conſiſts of our *Statutes*, or *Acts* of *Parliament*. *Secundo*, The *Acts* of *Sederunt*, which are *Statutes*, *made by* the *Lords* of *Seſſion*, by *vertue of a particular Act of Parliament*, * *impowering them*, *to make ſuch conſtitutions as they ſhall think fit*, *for* ordering the *procedure*, and *forms* of *Adminiſtrating juſtice*, and theſe are called Acts of *Sederunt*; becauſe they are made by the Lords *ſitting in Judgement*; But are not properly Laws, the *Legiſlative power* being the *Kings Prerogative*. *Tertio*, The books of *Regiam Majeſtatem*, which are

Municipal Law of Scotland

Acts of Parliament

Acts of Sederunt K. Ja. 5 Par. 7. Act 93

Book 1. Tit. 1.

Regiam Majestatem.

generally looked upon as a part of Our Law; which with the *leges Burgorum*, and the other tractates, joyned by *Skeen* to them, are called the *old books of Our Law*, by many expreſs Acts of Parliament *.

*K. Ja. 1. par. 3 Act 54. K. Ja. 3. Par. 14. Act 115

Though the books of *Regiam Majeſtatem*, were originally but the works of one private Lawyer, writing by way of Inſtitution, and are now very much abrogated by Cuſtome.

Unwritten Law

Our unwritten Law, comprehends *the conſtant tract, of deciſions, paſt by the* Lords of Seſſion, which is conſidered as Law; the Lords reſpecting very much their own Deciſions; And though they may, yet they uſe not to reced from them, except upon *grave conſiderations. Secundo*, our *Ancient cuſtomes*, make up a part of our

our *Unwritten Law*, which have been universally received among us. The *Tacite consent* of *King* and *People*, operating as much in these, as *their express concurse* does, in making Laws; And such is the Force of custome, or consuetude, that if a Statute, after long standing has never been in observance. or having been, has run in desuetude; *Consuetude* prevails over the *statute*, till it be renewed either by a *succeeding Parliament*, or by a *Proclamation from the Council*: For though the Council *cannot make Laws*, yet they *may revive them.* Book 1. Tit. 1.

Some Laws are called *Declaratory*, because *they do not introduce any new Law, but declare what formerly was Law*; and these may *look Backward*, (that is to say) *cases even prior* Declaratory Laws

Book 1. Tit. 1.

to the Statute, must be Regulated by them; Though generally *Laws look forward* and regulate only future cases.

Laws should command, not perswade: and though the *rubrick* (or title) and *narrative of the Statute*, may direct a doubting Judge, yet if the Statutory words be clear, they should be followed in all cases.

All Laws should be so interpreted as to evite absurdities, and as may best agree with the mind of the *Legislator*, and *Analogie*, or general design of the common Law.

Corectory Laws. *Corrective Laws* (so we call these which *abrogate*, or *restrict former Laws*) *are to be strictly interpreted, for we should receed as little as can be from received Laws.*

Favourable Laws. *Favourable Laws* are to be extended, and the *paritie of Reason*,

ſon, often prevails with our Judges, to extend Laws to Caſes, that are founded on the ſame reaſon, with what is expreſly determined by the Statute. Book 1. Tit. 2.

Title II.

Of Juriſdiction, and Judges in General.

HAving reſolved to follow *Juſtinians* method, (to the end there may be as little difference found betwixt the Civil Law and ours, as is poſſible: And that the Reader may not be diſtracted, by different methods) I do reſolve firſt, to lay down what concerns the Perſons of whom the Law treats: *Secundo*, what concerns the things themſelves treated of, ſuch as *Rights*, *Obli-* Juriſdiction of Judges. objecta Juris.

Book 1. Tit. 2.

gations, &c. Tertio, The *Actions whereby these Righs are pursued,* which answers to the *Civilians, objecta juris, viz. Personæ, res, & Actiones.*

Persons Civil and Ecclesiastick.

The *Persons* treated of in Law, are either *Civil* or *Ecclesiastick,* the chief of both which in a Legal sense are *Judges,* with whom we shall begin. And for the better understanding of their Office, it is fit to know, that *Jurisdiction, is a power granted to a Magistrate, to cognosce upon, and determine in causes, and to put the sentence or decreet to execution, in such manner as either his commission, law, or practice does allow.*

K. C. 2. Par. 1. Act 2. Par. 3. Act 10.

All *Jurisdiction flows originally from the King,** so that none have power to make *Deputs,* except it be contained in their *Commission;* And if a *Depute,* appoint any under him,

him, that *Sub-Depute* is called properly a *Subſtitute*; and every Judge is anſwerable for the *Malverſation* of his *depute*. Book 1. Tit. 2.

Juriſdiction is either *Cumulative*, or *Privative*; *Cumulative Juriſdiction*, *is when two Judges, have power to Judge the ſame thing*; And generally, it is to be remembred, that the King is never ſo denuded, but that he retains an Inherent *Power*, *to make other Judges, with the ſame power that he gave in former* * *Commiſſions*; And thus he may erect lands, in a *Regality*, within the bounds of an *Heritable Sheriffſhip*, and *Burghs Royal*, within the bounds of a *Regality*; And theſe bounds, within which, a Judge may exerce his Juriſdiction, is called his *Territory*; ſo that if any Judge *exerciſe Juriſdiction, without his* Juriſdiction Cumulative and privative. K. C. 2. Par. 3. Act 18.

Book 1. Tit. 2.

his Territory, his ſentence is null: and among thoſe who have a *Cumulative Juriſdiction*, he who firſt cites, can only Judge; and this is called, *Jus Præventionis*.

Privative Juriſdiction, is, when one *Judge has the ſole power of judging, excluſive of all others*; ſuch power have the Lords of *Seſſion* in judging *Declarators of Property, Actions of proving the Tenor, Ceſſiones Bonorum, &c.*

Juriſdiction, is founded to any Judge, either becauſe the Defender *dwells within his Territory*, which is called, *Sortiri forum ratione domicilij*: or *ſecundo*, Becauſe, the Crime *was committed within his Territory*, which is called *Ratione delicti*; or *tertio*, If the Perſon purſued, have any immovable Eſtate, within his *territory*, though he live not within the ſame, he may be purſued by *any Action*

to affect that Estate, which is called *sortiri forum ratione rei sitæ.* Book 1. Tit. 2.

A *Jurisdiction*, *is said to be prorogate, when a person not otherwayes subject, submits himself to it, as when he compears before an incompetent Judge, and propons defences.* Prorogate Jurisdiction.

All Judges with us, must take the *Oath of Allegiance*, *and the *Test* * whereby they swear, *to mantain the Government of Church and State, as it is now established*; and an Oath *de fideli administratione*, before they exerce their Office, and no *excommunicate person, nor Rebel against the Government*, can Judge by our Law. *K. C. 2 Pat. 1. Sess. 1. Act 11. *Par. 3. Act 18.

If a person be pursued before a Judge, who is not competent, he may complain to the *Lords of Session*, and they will grant *Letters of Advocation*, whereby they *Advocate*, that is to say, *call* Advocation of Causes.

Book 1. Tit. 2.

call that cause from the incompetent Judge to themselves; And if after the *letters of Advocation* are intimated to that Judge, he yet proceed, his Decreet will be null, as given *Spreto mandato.*

Division of Jurisdictions.

Jurisdiction is either *Supream*, *Inferior*, or *Mixt*: These Courts are properly called *Supream*, from whom *there is no Appeal to any Higher Judicatory*, such as the *Parliament*, *Privy Council*, *Lords of Session*, the *Criminal Court*, and *Exchequer*: *Inferiour Judges* are such, *whose Decreets and Sentences are lyable to the Reviewes of the Supream Courts*, as *Sherriffs*, *Stewards*, *Lords of Regality*, *Inferior Admirals*, and *Commissars*, *Magistrates of Burghs Royal*, *Barrons*, and *Justices of Peace*. *Mixt Jurisdiction*, *participates of the Nature both* of the *supream* and *inferiour Courts*; such a Jurisdiction have

Supream Courts.

Inferior Courts.

the

the *High Admiral*, and *Commiſſars of Edinburgh*. Both which are in ſo far *Supream*, that *Maritim Affairs*, and *Confirmations* of *Teſtaments*, muſt come in and be tabled, before the *High Admiral*, and *Commiſſars of Edinburgh*, in the *firſt inſtance*. As alſo, they both can reduce the Decreets of *Inferior Admirals*, and *Commiſſars*; But ſeeing their Decreets are ſubject to the review of the Lords of Seſſion, they are in ſo far interiour Courts. Book 1. Tit. 2.

No inferior Judge can judge in the cauſes of ſuch as are *Cuſin-germans* to him, or of a nearer Degree, either of *Affinity* or *Conſanguinity*; But there is ſo much truſt repoſed in the *Lords of Seſſion*, that by a ſpecial *Statute, they can only be declined in caſes relating to their *Fathers*, *Brothers*, *Sons*, *Nephews*, *K. J. 6 par. 14. Act 212.

Book 1. Tit. 2. *K.C. 2 par. 3. Act 13.

phews, *or Uncles*; which by a late statute *, is likewise extended to the Degrees of *Affinity*, and to the *Lords of Privy Council*, and *Exchequer*, and the *Commissioners* of *Justitiary*, *and to all other Judges within the Kingdom.*

Priviledge of the Colledge of Justice. *K.C. 2 par. 1. sess. 3. Act 9.

The Members of the *Colledge of Justice*, have this priviledge, that they cannot be pursued before any inferior Judge; and if they be, the Lords will Advocate the cause to themselves. No cause within 200. Merks is to be Advocate to the Lords, from the Judge competent *.

Tit. III.

Of the Supream Judges, and Courts of SCOTLAND.

THe *King*, is the *Author* and *Fountain*, of all power, and is an *absolute*

ſolute Prince, having as much pow-
er, as any King, or Potentate what-
*ſoever, * deryving his Power from*
*GOD Almighty alone * , and ſo*
not from the People. The ſpecial
priviledges that he has, are cal-
led, *His Prerogative Royal*; ſuch
as, that he only can make
Peace, or *War*, call *Parliaments*,
Conventions, *Convocations* of the
Clergy, make *Laws* *; And ge-
nerally all meetings called
without his ſpecial command,
are puniſhable ||, he only can
remit Crimes, legitimate Ba
ſtards, name Judges, and Coun-
ſelours, give Tutors Dative,
and naturalize Strangers; And
is *ſupream over all Perſons, and in*
all cauſes, as well Eccleſiaſtick as
Civil *.

The Parliament of old, was
the *Kings Barron Court*, in
which all Free-holders were o-
blidged to give ſute, and pre-
ſence

Book 1. Tit. 3.
*K. J. 6 Par. 15. Act 251
*K. C. 2 Par. 1. Seſſ. 1. Act 5. and 15 Par. 3. Act 2.
* Act 3 and 11. Par. 1. Ch. 2.
*K. C. 2 Par. 1. Seſ. 1. Act 2.
*K. J. 6 Par 18. Act 1. K. C. 1. Par. 1. Act 5.
K. C. 2. Par. 2. Seſ. 1. Act 1.

Book 1. Tit. 3.

ſence in the ſame manner that Men appear, yet at other head Courts. And therefore, ſince we had Kings before we had Parliaments, it is evident, that the Kings power flowed not from them.

The Parliament is called by Proclamation, now on fourty days, tho it may be adjourned by Proclamation, on twenty days preceeding the prefixt day, atwhich it ſhould have met; but of old it was called by *Brieves* out of the *Chancellary*. It conſiſts of *three Eſtates*, *viz.* the *Arch-Biſhops* and *Biſhops*; And before the Reformation, all *Abbots* and *Mitred Priors*, ſat as *Church Men*. *Secundo*, The *Barrons*, in which eſtate are comprehended, all *Dukes*, *Marqueſſes*, *Earles*, *Viſcounts*, *Lords*, and the *Commiſſioners*, for the Shires; For of old, all Barrons who held

held of the King, did come; but the Eſtates of leſſer Barrons not being able to defray this Charge, they were allowed to ſend Commiſſioners for every Shire. || And generally, every Shire ſends two, who have their Charges born by the Shire. *Tertio*, The *Commiſſioners for Burghs Royal*, each whereof is allowed one, and the Town of *Edinburgh* two; Though all the three Eſtates muſt be cited, yet the Parliament may proceed, albeit any one Eſtate were abſent, or being preſent would diſaſſent. The *Legiſlative power is only in the King, And the Eſtates of Parliament only conſent*; and in Parliament *the King has a Negative Voice, whereby He may not only hinder any Act to paſs, but even any Overtures to be firſt Debated there.* The Acts of Parliament muſt be

Book 1. Tit. 3.

†K. J. 1 Par. 7. Act 101
K. J. 6. Par. 11. Act 311

Book 1. Tit. 3. *K. J. 6 Par. 7. Act 128. be proclaimed upon fourty dayes, that the *Lieges* may know them; And till these fourty dayes elapse, they are not binding.

Lords of the Articles

To secure the Crown against Factions, and impertinent Overturs in open Parliament, our Parliaments choose before they proceed to any business, *eight* out of each *State*, who with the *Officers of State*, determine what Laws or *Overturs* are to be brought in to the Parliament; and they are therefore called, *The Lords of Articles*: And are chosen in manner following, *K. C. 2 p. 1. ses. 3. Act. 1 First, the whole Bishops go by themselves; And the Nobility by themselves; And the Clergie make choice of eight Noblemen; And the Noblemen make choice of eight Bishops; And then both Clergy and

and Nobility meet together, and make choice of eight Barons, and eight Burgeſſes; which Election being reported to the Parliament, it is by them approven, The *Officers of State* being ſtill *ſupernumerarie.* Book 1. Tit. 3.

We have another meeting of the *three Eſtates*, called *The Convention of Eſtates*, which is now indicted on twenty dayes, and proceeds in the ſame way that the Parliament does, differing only from it, in that the Parliament, can both impoſe Taxations, and make Laws; whereas the *Convention of Eſtates*, can only impoſe, or rather offer Taxations, and make Statutes for uplifting thoſe particular Taxations. But can make no Laws. And of old, I find by the *Regiſters* of the *Conventions*, (the eldeſt whereof Convention of Eſtates.

Book 1. Tit. 3.

whereof now extant, is in *Anno* 1583.) that the *Convention of Estates consisted of any number of the three Estates, called off the Streets summarly by the King*; And yet they cryed down, or up Money, and judged Processes, which now they do not.

Privie Council

The *Privy Council* is *constituted by a special Commission from the King, and Regularly their power extends to matters of publick Government; in order to which, they punish all Ryots*; for so we call *Breach of Peace. They sequestrate Pupils, gives Aliments to them; And to Wives who are severely used by their Husbands*, and many such things, which require so *summar procedour*, as cannot admit of the delays necessary before other Courts; And yet if any of these, dip upon matter

ter of Law, (for they are only Judges in *Facto*,) they remit the Cognition of it to the Seſſion, and ſtop till they hear their report. The *Council alſo may delay Criminal Executions; and ſometime change one puniſhment into another, but they cannot remit Capital puniſhments; They may alſo Adjourn the Seſſion, or any other Court*: It has its own *Preſident*, who preſids in the Chancellours abſence, and its own Signet and Seal: All who are cited to Compear there, muſt be *perſonally preſent*, becauſe ordinarly the Purſuer concludes, that they ought to be *perſonally puniſhed*. All *Dyets are peremptor*, all Debate is in Write, no Advocate being ordinarly allowed to plead before them, becauſe the Council only judges in matters of Fact. Book 1. Tit. 3.

The

Book 1. Tit. 5.

The Lords of Council and Session.

The Lords of *Council* and *Session* are Judges in all matters of *Civil Rights*; of old, they were chosen by the Parliament, and were a Committee of Parliament *. But the present model was fixt and established by *King James the fifth*, after the model of the Parliament of *Paris* *.

*K. J. 2 par, 14. Act 61, 62, &63

Of old it consisted of seven *Ecclesiasticks*, and seven *Laicks*, and the *President* was a *Churchman*; But now all the fifteen are *Laicks*. And there sits with them four Noblemen, who are called *Extraordinary Lords*; and were allowed to sit to Learn, rather then Decide: But now they vote as well as the *Ordinary Lords*. All the Lords are admitted by the King, and by Statute cannot be admitted till they be twenty five years of * Age, and except they have

*K. J. 5 par. 5. Act 36, 37, 38, 39, 40.

*K. Ja: 6: Par: 12: Act 132.

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2000 *lib.* or 20 *Chalders* of *victual* in yearly rent. Nine are a *Quorum.* Book 1. Tit. 3.

Crimi-nal Judges.

Crimes of old, were judged by the *Juſtice General*, *Juſtice Clerk*, and *two Juſtice Deputes*; but now *five Lords of Seſſion*, are joyned to the Juſtice General, and Juſtice Clerk, and they are called the *Commiſſioners of Juſticiary*; Becauſe, they ſit by a ſpecial Commiſſion: Four of which number make a Quorum in time of Seſſion, three in time of Vacance, and two at Circuit Courts ‖.

‖ K. C. 2. Par. 2 Seſſ. 3 Act 18.

The *Exchequer*, is the Kings Chamberlain, Court ‖ wherein he judges what concerns his own Revenues; It conſiſts of the *Theaſaurer*, (in whoſe place are ſometimes named *Commiſſioners of the Theaſaurary*,) the *Theaſaurer Depute*

‖ K. C. 1. par. 1. Act 18. Exchequer

Book 1. Tit 4. pute, and as many of the Lords of Exchequer, as his *Majestie* pleases.

High Admiral

The *High Admiral*, has a Commission from the *King*, to judge in all Maritime affairs, not only in Civil, but also in Criminal cases, where the crime is committed at Sea, or within Flood mark, nor can the Lords of Session Advocat causes from him ‖, tho they can reduce his Decreets, as he does the Decreets of all inferior Admirals, or Admiral Deputes.

11 K. C. 2 par. 3 Act 16.

Tit

Tit. IV.

Of Inferiour Jurisdictions, and Courts.

NO Judicature whatsomever can sit in time of Parliament, without a Dispensation from the Parliament; and no Inferior Court can sit in time of Vaccance wtthout a Dispensation from the Lords of Session; But after *Michalmass* head Court the Restriction ends; And they may at any time proceed to *cognosce Crimes*, without Dispensation for *Interest Reipublicæ* that *crimes be punished without delay.*

Sherriff

The *Sherriff*, is the *Kings chief* and *Ancient Officer*, for

Book 1. Tit. 3. preſerving the *Peace*, and putting the Laws in execution ‖;
*K. J 6 par. 12. Act. 24. he has both a Civil and *Criminal Juriſdiction*, and his Commiſſion is under the *Great Seal*; he is oblidged to raiſe the *huy and cry* after all *Rebels*, and to apprehend them when required: To aſſiſt ſuch as are *violently diſpoſſeſt*: To apprehend ſuch as *ſay Maſs*, or *trouble the Peace*, and take caution for their appearance *: He is *Judge* in all crimes, Except Treaſon and the *Four pleas* of the *Crown*, to wit, *Murder*, *Fire raiſing*, *Robery*, and *raviſhing of Women* *; but Murder he can only judge, if the Murderer was taken with *red hand*, that is to ſay, *immediately committing the murder*; In which caſe, he muſt proceed againſt him *within three Suns*; And in *Theft*, he may *Judge*, if the

*K.C. 2 par. 1. Sef. 3. Act 15.

*Leg. Mak. 2 Act 11. Quoniam Attach. cap. 79.

Thief

Thief was taken with the *fang*. Book 1. Tit. 4.

The *Sherriff*, is alſo *judge competent*, to puniſh *Bloodwits*, for which he may fyne in 50 *pounds Scots*, but no higher *Regularlie*; Except the *Ryot* be *Atrocius* or *Aggravated*, by the circumſtances of *the time and place*, when and where it was committed; or of the perſons upon whom it was committed. He may likewiſe for *contumacie* fine in 50. pound *Scots*.

Royal Burrows are not *Sherriffs* within themſelves, except the *King* grant them the *Priviledge*; by a ſpecial *conceſſion*, and even when they are erected *Sherriffs* within themſelves, they are not Exem'd from the *Sherriffs Juriſdiction*, within whoſe bounds the *Burgh* doth lye, but they have only a *Cumulative* Power with them, ſo that there is *locus prevention*, and

Book 1. Tit. 4.

the first Atacher will be preferred; But if their Erection contain a power of Repledging from the *Sherriff*, then they have the same Power that is *competent* to a Lord of *Regality*.

Lords of Regality

A *Lord of Regality is he who has the land whereof he is proprietar, or Superior, erected with a Jurisdiction, equal to the justices, in Criminal cases, and to the Shirreff in civil causes; he has also right to all the Moveables of Delinquents and Rebels, who dwell within his own Jurisdiction*; whether these *moveables* be within the Regality, or without the same; And because he has so great power, therefore no *Regality* can *legally be granted except in Parliament* *.

*K. J. 2 par. 11. Act 43.

Repledgiation

The *Lord of Regality*, has also by his erection, *power to repledge from the Sherriff*, and even

even from the *Juſtices* in all * caſes except *Treaſon*, and the *pleas* of the *Crown*, *that is to ſay*, *to appear*, *and crave*; *that any dwelling within his Juriſdiction*, *may be ſent back to be* judged by him, and he is obliged to find caution, that he ſhall do Juſtice, upon the *Malefactor* whom he *repledges*, within year and day, and, the *caution* is called *Culreach* *.

* Book 1. Tit. 4.

* K. J. 6 p. 11. Act 29.

*Quoniam Attach. cap. 89

The *Stewart*, is the *Kings Sherriff*, within the *Kings* own proper Lands, having as much power and Priviledge as an *Regalitie*; And theſe were Erected where the Lands having been erected before in *Earledomes*, or *Lordſhips* fell in the *Kings* hand by forefaulture or otherwiſe. For elſe the *King* appointed only a *Baillie* in them, and theſe *Juriſdictions* are called *Bailliaries*, the *Baillies*

Stewart

Bailie.

Book 1. Tit. 4.

of the Kings proper Lands having the ſame power with the *Sherriff*. And all theſe, *viz.* the *Sherriff*, the *Stewart*, and the *Lord of Regality*, proceedin their *courts* after the ſame way, and each of them, has a *Head Burgh*, where they hold their *courts*, and where all Letters muſt be executed and Regiſtrated.

Prince of Scotland.

The *Prince of Scotland* has alſo an *Appanage*, or *Patrimony*, which is erected in a *Juriſdiction*, called the *Principality*. The Revenues comes in to the *Exchequer*; when there is no *Prince*; but when there is one, he has his own *Chamberlain*.

Juſtices of Peace

Juſtices of Peace, are theſe who *are appointed by the King, or privy Council*, to *advert to the keeping of the Peace*, and they are Judges to *petty Ryots, Servants fies*, and many ſuch like, relating to good neighbour

bour-hood, expreſt in the Inſtructions, given them by the *Parliament** and are named by the *Council*; albeit, by the foreſaid *Statute*, the *Nomination* is to be by His *Majeſty*; and His *Royal Succeſſours*, which the *King* has now remitted to the *Privy Council*. Book 1. Tit. 4. *K. C. 2 par. 1. Act 38.

Conſtables.

The *Juſtices of Peace* do name *Conſtables*, within their own bounds, from ſix months to ſix months; Their *Office is*, to *wait upon the Juſtices*, and *receive Injunctions from them*, *delute ſuch Ryots* and *Crimes* to the *Juſtices*, as *fall under their Cogniſance*, *Apprehend all ſuſpect Perſons*, *Vagabounds*, and *night Walkers*, as is at length contained in their Injunctions, given them be the foreſaid *Act*.

Barron Courts.

Every *Heritor* may hold *Courts* for cauſing his Tennents

Book. 1 Tit. 4.

pay his rent; And if he be infeft, *cum curijs*, he may decide betwixt Tennent and Tennent in small debts, and may judge such as *commit blood on his own ground*; tho his land be not erected in a *Barronie*; But if his land be erected in a *Barronie*, (which the *King* can only do:) he may (like the *Sherriff*) *unlaw* for *blood-wits*, in 50 *lib.* and for ablence in 10. And if he *have power of Pit* and *Gallows*, he has as ample a *criminal Jurisdiction* as the *Sherriff*, though with this difference, that the *Sherriff* can judge a *Thief upon Citation*, whereas the *Barron*, can only judge him if he aprehend him within the *Barronie*; And if the *Sherriff* have first *Cited*, or *Attached* the *Malefactor*, he Excluds the *Barrons Jurisdiction* by that prevention.

Tit.

Tit. V.

Of Eccleſiaſtick Perſons.

SInce the *Reformation*, the *King* is *come by Our Law in place of the Pope* *, and all rights to *Kirklands*, muſt be confirmed by him, elſe they are null *. His *Majeſtie* only can call *Convocations* of the *Clergie*, (for ſo we call our *National Aſſemblies* *) and his *Commiſſioner* ſits in them, and has a negative.

*K. J. 6 par. 1. Act 2.
*K. J. 6. par. 9. Act 7.
Convocation of the Clergie
*K J. 6 par. 8. Act 131 K. C. 2.

We have *two Archbiſhops*, and *twelve Biſhops*, and they are thus *Elected*, the *Kings* ſends to the *Chapter* a *Conge de Eſlire*; (which is a *French* word, ſignifying a *power to Elect*,) and with it a letter recommending a perſon therein named, And the

par. 1. Sef. 1. Act 4. Sef. 3. Act 5. Archbiſhop and Biſhops.

Book 1. Tit. 5. the *Chapter* returns their election: Whereupon the *King* grants a *Patent* to the elected, giving a right to the Revenue during life; and a *mandate* to the *Archbiſhop*, or *Biſhops*, to Conſecrate him: Both which paſs the *great Seal* *.

*K J. 6 par. 22. Act 1.

Synods. The *Archbiſhops* and *Biſhops*, *have the ſole Power of calling Synods*, which is a *Provincial Aſſembly of all the Clergie within one Diocie*; And in theſe, they name the *Brethren* of the Conference: Who are like the *Lords of Articles* in the *Parliament*, and by their Advice the *Biſhops*, depoſe, ſuſpend, and manage.

*K. J. 6 par. 21. Act 1.

Chapter *Biſhops* have their *Chapters*, without whoſe Conſent or the *major Part*, the *Biſhop* cannot alienate nor dilapidate any part of their Patrimony *, which *major Part*, muſt ſign the deeds done be the *Biſhops*; And

*K. Ja. 6. par. 18. Act 3.

And it is ſufficient if thoſe of the *Chapter*, ſign at any time even after the *Biſhop*; but it muſt be in his life time: Nor are *Minors*, or *abſents*, counted; and one having two *Benefices*, has two vots; but the Appending of the *Seal*, is by ſpecial *Statute*, declared to be ſufficient in deeds done by the *Archbiſhop* of St *Andrews*, without the *Subſcriptions* of the *Chapter* *. Book 1. Tit. 5. *K Ja. 6. par. 19. Act 8.

A *Parſon* or *Rector Eccleſiæ*, is he *who is preſented to the Teiths, jure proprio*; But becauſe of *old*, *Parſonages* were beſtowed on *Monaſtries*, therefore they ſent *Vicars*, ſo called, becauſe they ſerved the *Cure for them*; and who got a ſhare of the Stipend, for their pains, either *ad placitum*; And they were called *ſimple Vicars*, or for *life*, and they Viccars

were

Book 5. Tit 5. were called *perpetual Vicars*, And after the Reformation, the Churches, which ſo belonged to them continued *Vicarages* ſtill; The *Titular*, who came in the place of the *Convent*, retaining the right to the *Parſonage duties*.

Collegiat Kirks. There were in the time of *Poperie*, *Collegiat Kirks* built, and *doted by Kings, and great Men*, for *ſinging of Maſs*, which were governed by a *Provoſt*, and ſome for *ſinging*, who were called *Prebends*; And becauſe, ſome *Pariſhes* were wide, ſome were allowed, to build a *Chapel* for their *private devotion*; And ſince the *Reformation*, theſe *Chaplanaries* and *Prebendaries*, are allowed to be beſtowed by the *Patrons*, upon *Burſers* in *Colledges*, notwithſtanding of the *Foundations**.

Chaplanaries.

*K. Ja. 6. par. 1 Act 12.

For underſtanding all theſe,

it

it is fit to know; that the *Primitive Church*, either to invite men to *build* or *dote*, or to reward ſuch, as had, did allow ſuch as either had built, or had beſtowed the ground whereon to build, or had *doted a Church*, already built, to *preſent alone*, if they were the only *Benefactors*, or *by turns*, if they were moe, and they were called *Patrons*, or *Advocati Eccleſiarum*, according to that, Book 1. Tit. 5.

Patronum faciunt, dos, Ædificatio, fundus.

When a *Church* vaiks, the *Patron* muſt preſent within ſix months, a fit *Perſon* to the *Biſhop*; elſe the right of *preſentation* falls to the *Biſhop jure devoluto*; * but if the *Biſhop* refuſe to admit and collate the perſon preſented, the *Patron* muſt complain Patron. *K. Ja. 6. par. 2. Act. 1.

to

Book 1. Tit. 6.

to the *Archbiſhop*, and if he alſo refuſe, or delay, the *Privy Council* will grant Letters of Horning againſt the *Biſhop*, to receive the *Perſon* preſented *, and during the *vacancy* upon that refuſal, the *Patron* may retain the *vacant ſtipends*.

*Act foreſaid.

Upon this *preſentation* the *Biſhop* cauſes ſerve an *Edict*, on nine dayes; wherein all perſons are after *Divine ſervice*, advertiſed, to object, why ſuch a man ſhould not be admitted to the *benefice*; And if none *object*, the *Biſhop* conferrs the Church and Benefice upon the *Perſon* preſented: and this is called a *Collation*, after which, the *Biſhop* cauſes enter him, who is ſo *collated*, by cauſing give him the *Bible*, and the *Keyes* of the *Church*, and this is called *Inſtitution*, *Preſentation*, gives only *jus ad rem*, and *Inſtitution*

Collation and Inſtitution.

tution, jus in re and is as a *Seaſine*. Book 1. Tit. 5.

If the *Biſhop* be *Patron* himſelf, he conferrs *pleno jure*; and the *preſentation*, and *collation*, are the ſame: *Biſhops* alſo have *Menſal Churches*, ſo called; Becauſe, they are *de menſa Epiſcopi*, being a part of his *Patrimony*, in which he ſerves by his *Viccars*, and *plants* as *Dioceſian* Biſhop; and if a *Town* or *Paroch*, reſolve to make a *ſecond Miniſter*, when they are not *Patrons*, he is called, a *Stipendiary Miniſter*; (as are all Miniſters who are preſented to *modified Stipends*) and he is *collated*, and *inſtituted* alſo, but the *Patrons* Preſentation is ſufficient in *prebendaries* and other *benefices*, which has not *curam Animarum*; And that without the neceſſity of *Collation*, or *Inſtitution*; the Biſhop having no other Intereſt in the *benefices*, but

Menſal Churches

Book 1. Tit. 5. but in ſo far as they concern the *cure of Souls.*

Miniſters Stipends. By Act of Parliament, all *Miniſters* muſt have a competent Stipend, not below *eight Chalder of victual*, or 800. *merks* or above a 1000. *Merks* or 10. *chalder of victual*: (except there be juſt reaſon to give leſs) * together with *a Manſe* and *Gleib.* But the *Commiſſioners for plantation* of Kirks, are not now precifely tyed to theſe Proportions, but may modifie either more or leſs, according as they ſee cauſe.

*K. Ja. 6. par. 22. Act 3.

Manſe. The *Manſe*, *à manendo*, is the place where the *Miniſter* is to dwell; the *Gleib*, from *Gleba terræ*, is *a piece of land for Corn and fother to his* Beaſts: If there was a *Manſe* of old belonging to the *Parſon* or *Vicar*, the *Miniſter* has right to it there was none, the

the *parochiners* muſt build one, not *exceeding a* 1000. *lib.* and not *beneath* 500. *merks* *, at the ſight of the *Biſhop* of the *Diocie*, or ſuch *Miniſters* as he ſhall appoint, with *two or three* of the moſt diſcreet men in the *paroch*: as alſo the *Heritors* are lyable to repair the *Manſe*; But the preſent *Incumbent* is obliged to leave it in as good *condition* as they gave it to him *. Book 1. Tit. 5. *K. Ja. 6. Par. 13. Act 161. *K, Ja. 6. Par. 21. Act 8.

The *Miniſters Gleib*, is to comprehend 4 *Acres of Arrable land*, or *ſixteen ſowms-graſs*, where there is no *arrable land*, which is to be deſigned out of the lands, which belonged of old to *Abbots*, *Priars*, *Biſhops*, *Friers*, or any other *Kirk-lands* within the *pariſh* *; with freedom of *foggage*. *paſturage* for a *horſe*, and two *Cows*, *fewel*, *feal*, and *divot*; which *Gleibs* are to be *K. Ja. 6. par. 3 Act 48.

Book 1. Tit. 2. be deſigned by *Miniſters* named by the *Biſhop*, with the advyce of two *of the moſt honeſt and godly of the pariſhoners*, and the deſignation is to be ſigned be the deſigners*.

*K. Ja. Par. 11. Act 116

If a *Biſhop* or *Miniſter*, be *conſecrated*, *tranſlated*, or *entered*, to his benefice before *Whitſunday*; he has right to the whole years fruits, becauſe *they are then preſumed to be fully ſown*, and if he be depoſed or *tranſported* before *Whitſunday*, for that ſame reaſon he hath no part of that year: But if he ſerve the *cure* after *Whitſunday*, and be *tranſported* or *depoſed* before *Michalmas*, he hath the half of that years Stipend; and if he ſerve till after *Michalmas*, he hath the whole. So that the *legal terms of benefices are Whitſunday*, *at which time the ſowing is ended*; and *Michal-*

mas

mas, at which time the fruits are reaped. Book 1. Tit: 5:

The *Relicts, Bairns, or neareſt of kine*, have likewiſe right to the *Annat* after their death, which was introduced by the *Cannon Law*, and by a ſpecial *Statute* with us, is declared to be *half a years rent of the benefice, or Stipend, over and above what is due to the Defunct, for his incumbancie*; So that if he ſurvive *Whitſonday*, they have the half of that year for his *incumbencie*, and the other half as *Annat*, and if he *ſurvive Michalmas*, they have the half of the next year for his *Annat*. *King Charles 2: par: 2 ſeſ: 3: Act 13

The *Annate* is equally divided betwixt the Relict and the Children, and if the *Defunct* have neither, it belongs to the neareſt of *Kine*; It needs no Confirmation, for it never belonged to the *Defunct*, being

a

Book 1: Tit: 3: a meer Gratuity bestowed by the *Law* for entertaining these. Because it is presumed, *Ministers* have not much to leave them; And for the same reason it is not affectable by the *Defuncts Creditors*, nor can it be Disposed upon by himself to strangers, either in his Testament or by Assignation.

There is a *committee of Parliament*, alwayes sitting, called the *commission for plantation of Kirks*, or *Valuation of teinds*, (consisting of a *Select* number: of so many of every *Estate of Parliament*;) who have power to *Modifie*, and *Augment Ministers Stipends*, and to *Unite* and *Disjoyn Churches*, *&c.* whose decreets; because they are a *Committie of Parliament* cannot be reduced by the *Session*, or any other *inferior Judicature*.

High Commission

committie of Parliament

The *Primitive Christians* remitted

mitted the Cognition of all caſes that related to Religion as the matters of *divorce*, *Baſtardie*, *the protection of dying mens Eſtates, to their Biſhops*; or ſuch as they imployed, under them, who were called *Officialls*, and with us are called *Commiſſars*; and are called therefore *Judices Chriſtianitatis*: And they are therefore the only Judges in *Divorce*; becauſe it is the breach of a *Vow*: And to *Scandale*, becauſe, it is an offence againſt *Chriſtianity*: And of all matters referred to *Oath*, (if the ſame exceed not 40 *lib. Scots*) becauſe that power is contained in their Inſtructions, and that an *Oath* is a *Religious tye*. Book 1: Tit: 5: Com-miſſars

Every *Biſhop* has his *Commiſſar*, who has his Commiſſion from the *Biſhop* only; and this extends no further, than the

Book 1: Tit: 5: the *Constituents Diocy.* But the *Archbishop of St. Andrews*, has power to name four *Commissars* who are called the *Commissars of Edinburgh*; because, they sit there, and they only are *Judges to Divorce upon Adultery*, and can only declare *Marriages null for Impotencie*, and to *Bastardy*, when it has any *connexion* with *adultery*, or *marriage*: And they only *may reduce the sentences of all inferior commissars* *, though the *Lords of Session* may reduce even their *decreets and sentences*; They have *instructions from the King*, which are their *Rule.* And these are likewise recorded in the Books of *Sederunt of Session.*

Commissars of Edinburgh

*King James 6 par: 26: Act 6.

Of

Title VI.

Of MARRIAGE.

Having ſpoken fully of Perſons, as they are conſidered in a Legal ſenſe; We ſhall now treat of Marriage, which is the chief thing that concerns Perſons, and their State in Law.

Marriage. MArriage is defined to be, the *conjunction of Man and Wife, vowing to live inſeparably together, till death.*

By *conjunction*, here, *conſent* is underſtood, *nam conſenſus, non coitus, facit Matrimonium.*

Conſent, is either *de futuro* or *de preſenti*, conſent *de futuro*, is a promiſe, to *ſolemnize the Marriage*, which in *Law*, is called *Sponſalia*; and this is Sponſalia.

Book 1. Tit. 6.

not *Marriage*; for either party, may resile, *rebus integris*, notwithstanding of the *interveening Promise*, or *Espousals*, consent, *de presenti*, is that in which *Marriage* does consist; and therefore, it necessarly follows, that none can *Marry*, except these who are *capable* to consent, and so *Idiots*, *and furious Persons*, *durante furore*, cannot *Marry*; nor *Infants*, who have not attain'd the use of *reason*: that is, when they are within the *years of Pupillarity*; which is defined in *Law*, to be 14 years in *Males*, and 12 in *Fæmales*, *nisi malitia suppleat ætatem.*

The *Law*, in *decencie*, requires the consent of *Parents*, though a *Marriage* without it, is valid, if the persons *Married* be *capable* of consenting.

By our *Law*, none can *Marry* who are nearer relations than *Cusin*

Cuſin Germans; which is ſuitable to the *Judicial Law* of *Moſes* * . and the ſame degrees prohibited in *Conſanguinity* are alſo forbidden in *Affinity*. Book 1. Tit. 6. * *Levit.* chap. 18 K. J. 6.

Marriage; is either *Regular*, and *Solemne*, or *Clandeſtine*; the *Regular* way of *Marrying*, Is by having their names proclaim'd in the *Church*, three ſeveral times, which we call Proclamation of *Banns*, without which, or, a Diſpenſation from the *Biſhop*, the *Marriage* is called a *Clandeſtine Marriage*; & the parties are *ſynable* for it; and both loſe their* *Jus Mariti*, and *Jus Relicti*, but the *Marriage* is ſtill valid*; *Cohabitation* alſo, or dwelling together, is preſum'd to be *Marriage* *, if the Parties were repute, *Man and Wife, dureing their life-time*, and ſo the *Children* are not *Baſtards*; though they cannot prove Par. 1. Act 1. Diviſion of Marriage. *K. C. 2 p. 2. ſeſ. 3. Act 9. *K. C. 2 par. 1. Seſ: 1: Act 34. *K J: 4 par: 6. Act. 77. K. C. 2 par: 2: Act: 9: Seſ. 3.

Book 1. Tit. 6.

that their *Parents* were *Marryed* unleſs it be clearly prov'd that they *were not Married.*

Com-munion of goods

From the *conjugal Society*, ariſes, the communion of *moveable Goods* betwixt *Man* and *Wife*, but the *Adminiſtration* thereof during the *Marriage* is ſolely in the *Husband*; which reaches even to Alienation, and diſpoſing upon the Moveables, at his pleaſure, though they be not diſpon'd to him by her (Marriage, being a *Legal Aſſignation*, as to this effect) but he has no further *right* to her *heritage*, ſave that he has *right* to the *Rents of* it, and to *adminiſtrate* & *manage* it, during the Marriage, and this is called, *Jus Mariti*, and is ſo inſeparable from the qualitie of a *Husband*; that he cannot by *Our Law*, *Renounce his Power of Adminiſtration*, ſo that they

Jus Mariti.

they are both *Domini*, by this *communion*; but the *Husband* has during the Marriage; the Administration and disposall of the goods in the communion; But a Stranger may Effectually convoy an estate to a *Wife*, so as that it will never be Subject to the *Husbands Administration.* Book 1. Tit. 6.

The *Husband* is lyable dureing the Marriage to pay her moveable *debts*; but how soon the Marriage is dilolv'd, he is no further lyable to pay her *debts*; than in as far as he was a *Gainer* by her *Estate*, or that their was such diligences done against him during the marriage that affects his estate, either heritable or moveable.

If the *Wife* contract any *debt*, or do any other deed; after the Proclamation of *Banns*, the *Husband* will not

Book 1. Tit. 6.

be thereby *Prejug'd.*

The *Husband* is also oblig'd to *Aliement his Wife*, and if he refuse, the *Privy Council*, or *Lords of Session*, *will modifie an Aliment* to her out of her *Husbands* means, suitable to his Qualitie, which they will also grant, *ob sævitiam*, if he treat her *Inhumanely.*

The *Husband* is *Tutor*, and *Curator* to his *Wife*, and therefore, if she had *Tutors*, or *Curators*, formerly, their power is *devolved* over by the *Law* upon the *Husband*; and whatever deeds she does without his consent are *null*, whether she be *Major* or *Minor*, and when she is *cited*, he must be *cited* for his Interest; and if she Marry, during the Dependence of an *Process*: The *Husband* must be called by *Letters of Suplement.*

Be-

Becauſe, the *ſole Adminiſtration*, during the Marriage belongs to the *Husband*; *Law* hath ſecured the *Wife*, that ſhe cannot oblige her ſelf when ſhe is cloathed with a *Husband*, albeit with his conſent, and therefore all Bands, and Obligatious, granted by a *Wife ſtante Matrimonio*, are *ipſo jure*, *null*; but if ſhe oblige her ſelf, *ad factum preſtandum*, ſhe will be *lyable*, as if ſhe ſhould oblige her ſelf to *Infeft* any Man in Lands properly belonging to her ſelf. Book 1 Tit. 2.

During the *Marriage*, all *donations* made betwixt *Husband* and *Wife* are *Revockable*, at any time in their *life*, (except in ſo far as they are *ſuteable proviſions*) leſt otherwayes, they might *ruine themſelves*, thorow *Love*, *Fear*, or *Importunity*; and that either expreſly, by Donatio inter virum & uxorem.

Book 1. Tit. 6. *Revocking* what is done (though they obliged themſelves not to *Revock*) or *tacitly*, by *diſponing to others*, what was ſo *gifted*.

All *Rights* made by a *Wife* to her *Husband*, or any third partie with his conſent and to his behoof, are valid *Rights*; if they be *Ratified* by her before a *Judge*, before whom ſhe is to declare *without the preſence of her Husband, that ſhe was not compelled to do that deed*, and *Swear, that ſhe ſhall never quarrel the ſame*: whereas, if they be not *Ratified*, they may be *quarelled*, as *extorted, vi & metu*, or may be *Revocked* as *donatio inter Virum & Uxorem*, which the *ratification* before any judge does abſolutely exclude, *Propter Religionem Sacramenti*, the *Ratification*, being *extra preſentiam mariti*; though ſhe was forc'd.

Marriage is diſolved either by

by *Death*, or *Divorce*, and if the *Diſolution* of the *Marriage*, be by *Death*, there is a difference, if the ſamen be within *Year* and *Day* of the *Marriage*, or thereafter; for if either the *Husband* or the *Wife* die within the *Year*, all thing; done in *tuitu Matrimonii*, become void, and return to the ſame Condition they were in before the Marriage; except there be a *living Child*, *procreat* of the *Marriage*, *who was heard cry*. Book 1. Tit. 6. Diſolution of Marriage.

If the *Marriage* be diſolved by *Death* after the year expyres, then the *Wife ſurviving*, has right to a third of the *moveable Eſtate*; if there be Children; and to the half, if there be none, and this is called *jus Relictæ*; and tho this Right does not hinder the *Husband*, to give or diſpoſe upon his *Moveables*, in his *life*, Jus Relictæ

Book 1. Tit. 6. yet *he cannot do any deed to defraud his Wife of this Right*, the *fraud* being *palpable*; ſhe has alſo a right to a *liferent of the third of the Lands*, wherein he *dyed infeft*, and this is called a *Widows Terce*; and to any other *Proviſions* contained in her *Contract of Marriage*; And if ſhe be provided to any particular Proviſion, ſhe is excluded from a *Terce* *; *Nam in hoc caſu proviſio hominis tollit proviſionem Legis*, unleſs her *Terce* be expreſly reſerved. A *Wife* has Right to her *Paraphernalia*, excluſive both of the *Husbands Dominium* and *Adminiſtration*, by which is meant her wearing Cloaths and Jewels; and the Husband ſurviving has Right to the Tocher: And if he marry an *Heretrix*, he has Right to all her Lands, after her Death, during his own Life,

Terce.

*K.C.2 par. 3. Act 10.

Paraphernalia.

Life, if there be a *Child* of the Marriage who was heard *cry*, and this is called, *the Courtiſie of Scotland* *

Book 1. Tit. 6.

Courteſie of *Scotland*

Marriage may be either declared to have been null *ab initio*, for *Impotencie*, *Contingencie* of blood, or that either Partie ſtands married; or elſe it may be diſolved for Adulterie. The Cognition of all which belongs to the *Commiſſars* of *Edinburgh* privativelie: or for wilful *Deſertion*, to be purſued by an Action for *non adherence*, either before the *Commiſſars* of *Edinburgh*, or any inferiour *Commiſſar*, to whoſe Juriſdiction the parties are lyable, after malitious diverting for 4 *years*, they being thereupon (after due Admonition to adhere, and Citation for that effect) excommunicated; which Sentence

* Reg. Ma. lib 2. c. 3. Lg 8. Burg. cap. 44.

Book 1. Tit. 7. *K. J:6 par. 4. Act 15

tence being pronunced, is a ſufficient Cauſe of *Divorce* *: In which Caſes the *Perſuer* muſt give his *Oath*. that the *Proceſs* is not carried on by *Colluſion*, and after a *Decreet* of *Divorce* is obtained, in either Caſe the *Partie Innocent* may *marry*; but the *Partie* that is *guilty* cannot, and beſides looſes all the benefit that they could expect by the *Marriage*.

Tit. VII.

Of Minors, and their Tutors, and Curators.

WHilſt Perſons are within *twenty one years*, the Law preſumes them to want that firmneſs of *Judgment*, which is requiſite, for the exact managment of their Affairs; and during

during that time, they are called *Minors*, by a general Term; though properly, such only are called *Minors*, who are past *Pupillarity*, which lasts in *Males* till *fourteen*, and in *Famels* till *twelve*. Book 1. Tit. 7. Minors.

Tutory may be defined, *a power and faculty, to govern the Estates, and Persons of Pupils*; and the Law gives *Tutors*, and *Curators*, for the *manadgement* of their *Affairs*. Definition of Tutory.

There are three kinds of *Tutors*, viz. *Tutor nominate*, *Tutor of Law*, and *Tutor dative*; *Tutore nominate*, (who is likeways called *Tutor Testamentar*) is he who is left *Tutor* by the Father in his *Testaments*, or any other *write*, and he is not obliged to find *Caution*, or give his *Oath*, *de fideli administratione*; becauſe it is preſumed, the *Parent* hath choſen a ſufficient perſon. Diviſion of Tutors. Tutor Teſtamentar.

The

Book 1. Tit. 7. The *Father* only can name *Tutors*; but if the *Mother*, or even a Stranger, *give or dispone* any thing to a *Child*, they may name a *Tutor* to manage what they give; but if there be no *Tutor* nominate, or if he accepts not, then there is place for a *Tutor of Law*, who is so called, because he succeeds by *Law*, and generally, the nearest *Agnate* (for so we call such as are related by the *Father*) who is to succeed to the *Minor*, being past *twenty five years*, and would be *Heir* to him, is his *Tutor in Law*: He takes a *Brieff* out of the *Chancellarie*, and *serves himself before any Judge*, to whom it is directed, and the *Tutor of Law* must find *Caution* before he *Administrate*.

Tutor of Law.

*K:J:3: p:7. Act 32.

If he do not *serve* within a *year* after the time he might have served, then any person may

may give in a *Signator* to the *Exchequer*, and he gets a gift under the *Privie Seal*, of being *Tutor Dative*, and finds *caution*, *acted in the books of Exchequer*: But of old, they found *caution* in the *Commiſſars books*: this *Tutor* and he only is oblidged to make *Faith*, *de fideli adminiſtratione*. Book 1. Tit. 7. Tutor Dative.

If there be moe *Tutors* than one, the *major part* muſt all conſent; but the *Pupil* needs not *ſubſcrive* with his *Tutors*, though a *minor* muſt ſubſcrive with his *Curators*: But if there be a *Tutor*, *ſine quo non*, he muſt alwayes be one of the Managers and Conſenters.

After the years of *Pupilarity*, there muſt be a Summons raiſed at the *Pupils* inſtance, ſummonding ſome of the *Fathers-ſide*, and ſome of the *Mothers-ſide*, upon nine days warning, to

Book 1. Tit. 7.

to appear before any *Judge*; and at the day, the *Minor* gives in a List of those he intends to choose to be his *Curators*, and those who accept must Subscrive the acceptation, and they must find Caution *de Fideli* *, upon all which the *Clerk extracts an act*, which is called, *an Act of Curatory*: There uses to be sometimes, *Curators, sine quibus non*, and the *Major part* with these are still a *Quorum*; except the *Minor* in his *particular Election* hath appointed otherwise; for the *Quorum* is in the *Minors* power, and the *Act bears* how many shall be a *Quorum*.

Curators.

*Q. M. par. 6. Act 35.

There are these *difference*, betwixt *Tutors* and *Curators*, that *Tutor datur personæ*, *Curator rei*, a *Tutor Acts*, and *Subscrives* for his *pupill*, a *Curator* with him; but both must

Difference betwixt Tutors and Curators.

must make *inventarie* of all the *Pupils Estate* before they *Administrate*, with consent of the neareſt of *Kinne* on both ſides, and if they neglect to make *Inventary*, they will get no *Expenſes* allowed them during their Adminiſtration, and may be removed from their Offices as ſuſpect*; neither have *Salaries*: and both are lyable to *Compt*, but not till their *Office expyre*, as both have *Action* againſt their *Minors*, for what they *profitably expended* during their *Adminiſtration*, which is called, *Actio tutelæ contraria.*

Book 1: Tit. 7:

Inventary.

* K:C:2 par. 2 Seſſ: 3 Act 2.

If the *Minor* have *Curators*, and do any thing without their conſent to his prejudice; (for he may make his condition better without them, but not worſe, the advantage being evident and without *hazard*)

Book 1. Tit: 7. *zard*) then that Act is, *ipſo jure null*, that is to ſay, he needs not *Revocks*; but if he have no *Curators*, then any Act he does to his own *prejudice* is *valid*; but he muſt reduce the ſame thus, *viz.* he muſt writ a *Revocation* and ſubſcrive it before *two Witneſſes*, and *Regiſtrate* it, and thereupon he muſt raiſe and *execute* a *Summonds* of *Reduction* of that Act, *ex capite Minoritatis, & læſionis*, before he be 25 *years of Age*, wherein he muſt make appear, he was both *Minor*, and was *læs'd*; otherwayes, the *Lords* will not repone him: Though this *Revocation* be not abſolutely neceſſarie, yet the *executing* of a *Summonds* before 25 is abſolutely neceſſary: and though a *Minor ſwear* not to *Revoke*, yet this *Oath* is declared null by *Law*, and the *Eliciter* of it puniſhable

niſhable, and infamous *; but if he *Fraudulently circumveene* another, by ſaying he was *Major*, he will not be reſtored againſt his own *fraud*. Book 1 Tit. 7. *K.C. 2 par. 3. Act 19.

A *Tutor* or *Curator*, cannot purſue his *Pupill*, till he has *compted* for his *intromiſſions*; for it preſum'd he has his *Pupils* Eſtate in his own hands, and whatever Right he buyes of what belong'd to his *Pupill* is preſum'd to be bought with his *Pupils* means; and ſo the advantage muſt *accreſs* to the *Pupill*.

So careful has *Our Law* been to *protect* *Minors*, and to ſecure *Old Eſtates*, that *minor non tenetur placitare ſuper hæreditate paterna* *, that is to ſay, a *Minor* is not obliged to anſwer any *proceſs* that may Evict his *Fathers Heritage*; but, yet if his *Fathers* Right be quarrelled for * Statut: à Will. cap. 39.

for his *Fathers crimes*, or *delicts*, as in the cases of *falshood*, *forfeiture*, or *Recognition*, these cases are excepted, and he is obliged to answer. *Secundo*, This *priviledge* extends not to *Actions* concerning *marches*, or *division of lands*. *Tertio*, It defends not against the *Superiour persueing* for his *casualities*. *Quarto*, Where the *minors* right is only *quarrell'd consequentialy*, the chief right *quarrelled* belonging to a *major*, there is no place for this Priviledge. *Quinto*, It defends not in cases where the *Heritage* was *deryv'd* from *Collaterals*, such as *Brothers*, or *Uncles*. *Sexto*, It defends only where the *Heritage* descended even from the *Father*, or *Grand Father*, if they dyed in peaceable Possession, and if no *Process* was intented against them in their own *life time*

time. *Septimo*, It takes only place, where the *Father* was *actually infeft*; but then it is *accounted Heritage*, tho it was *conqueſt* by the *Father.* Book 1. Tit. 7.

The Priviledge of *Minority*, is in ſome caſes allowed to the *minors Heir*: Which are compriſed in theſe following Rules. 1. If a *minor* ſucceds to a *minor*, the time *of Reſtitution is Regulated* by his own *minority*, and not by his *Predeceſſors.* 2. If the *Predeceſſor* be *major*, and *Intra quadriennium utile*, *reſtitution* is competent during the *Heirs minority*; but he has no further of the *anni utiles*, than remained to the *defunct*, the time of his *deceaſs.* 3. If a *Major* ſucceed to a *Minor*, he has only *quadriennium utile*, after the *Minors deceaſs*, or ſo much thereof as was *unexpyred* at that time. But this Priviledge

Book 1. Tit: 7.

ledge of *Minority*, as to the *Expyring* of the *Legal of Aprisings*, is *special* and *singular*; *vide infra*, Tit: *Apris* and *Adjud.*

Minority ends in both Men and Women, when they are 21. *years of Age compleat*; but after that there are 4 *years granted*, wherein they may *reduce* what they did to their *Lesion* and *prejudice* during their *Minority*; and these years are called *Anni utiles*, or *quadriennium utile.*

Idiotrie or furiositie.

If a Man be an *Idiot*, or *furious* he must be found to be so by an *Inquiest*, and thereafter his neareſt of *Kinne may serve themselves Tutors*; or the *Exchequer* may grant a *Tutor dative*, *if they serve not*; but the *Tutor in Law* will be preferred to that *Tutor dative*, offering to serve *quandocunque*, and it must be proven to the *Inquiest* at the time

time of the Service, that he is *furious*; and when he began to be ſo, and all deeds done by *him after that are null*, not only from the *date of the ſervice*, but from the time that he was *found* to be *Idiot*, or **furious*. Book 1. Tit. 7. *K. J. 6 par. 10. Act. 18.

If a Perſon be *Prodigal*, or *Spend thrift*, he *interdicts himſelf*, either *voluntarly*, which is done by a *Band*, whereby he obliges himſelf to do nothing without the conſent of ſuch Friends as he therein condeſcends upon; and theſe are therefore called the *Interdictors*, and if this *Narrative be falſe*, ſo that the perſon is not *improvident*, as he relates in the *Band*, this *voluntar Interdiction* will be reduced. *Secundo*, *Interdiction* proceeds upon a *perſute*, at the inſtance of the *neareſt of Kinne*, againſt the *Prodigal* whom the *Lords* will *interdict* if they ſee cauſe; Prodigals and their Interdiction.

or

Book 1. Tit. 7.

or 3*ly*. though there be no *persute*; yet if in another *processe*, they find he has been often, or is *obnoxious* to be cheated, they will *interdict him*, *Ex proprio motu*, and these two last are called *Judicial interdictions*; and no *interdiction* lasts longer than the *Levitie* and *Prodigality* which occasioned it, but this requires also the sentence of a *Judge*.

Letters of Publication

Upon this *voluntar Band*, the *Lords of Session* grant *letters of Publication*, and after these *Letters* are published, at the *Mercat Cross of the head Burgh of the Shire*, where the *person interdicted dwells*, and are *Registrated*; the *person interdicted* can do nothing to the *prejudice of his heritable Estate*, otherwayes the *interdicters* may *reduce* these deeds as done after the *publication of the interdiction*;

(for

(for interdictions extend only to *Heritage* ;) but yet the perſon himſelf is ſtill lyable to *perſonal execution*, even upon theſe deeds done after *inter-diction.* Book 1. Tit. 7.

A *Father*, is likewiſe in *Law Adminiſtrator* to his own *Children*, that is to ſay, is both *Tutor*, and *Curator*, to them, if they fall to any *Eſtate* during their *Minority*, and if either *Pupil* or *Minor* have any *Legal Action to proſecute*, and want *Tutors* or *Curators*, the *Lords* or any other *Judge* before whom the *Proceſs* is depending, will upon a *Bill Authorize Curators*, who are therefore called *Curators*, *ad lites.* Adminiſtrator in Law.

Tutors and *Curators* are not *Proprietars* but *Adminiſtrators*, therefore they can only *Manage* rationally, and do every thing for the *Utility* of the *pupil*, but even this *Adminiſtration*

Book 2. Tit. 1.

does not impower them to ſell Lands, or to Renounce any *Heritable Right* belonging to the *Pupil*; Except for paying of debt in which caſe, they muſt have a *Decreet* for their Warrand, nor does it impower them to ſet *Tacks*, for longer time then their office laſts; Nor can any *Tutor* be *auctor in rem ſuam*, by Authorizing the *Pupil* to do any deed, for his own advantage, ſuch as to become *Principal* or *Cautioner* for him to a third Party.

Diligence of Adminiſtrators. Pro-Tutors

All theſe *Tutors*, *Curators*, and *Adminiſtrators*, or any who behave as ſuch, and who are called in our Law *Pro-Tutors*, are lyable to do *exact Diligence*; and therefore, if any of their *Pupils Debitors* become *Bankrupt*, or their *Tennents* break, they are lyable *in Solidum*, ſo that the *Pupil* may purſue

purſue any one of the *Tutors* for the negligence of all the reſt, but he has his Relief againſt the reſt. Book 2. Tit. 1.

They are likewiſe lyable to put the *Minors Rents* out upon *Annualrent* within half a year, or a Term, after they receive them, and to put out his Money upon *Annualrent* within a year, both which times are allowed to get good *Debitors*, but if his *Bands* bear *Annualrent*, they are only obliged to take in theſe *Annualrents* once during their *Office*, and to turn them in a *principal ſumm*, bearing *Annualrent*.

After *Tutors* and *Curators* have once accepted they cannot *Renounce*; but if they miſcary or *malverſe* in their *Adminiſtration*, they maybe removed by an action, as ſuſpect *Tutors*.

If there be moe *Tutors* or

Book. 1 Tit. 4.

Curators, the *Office* upon the death of any of them *Accreſſes* to the *Survivers*; except they be named joyntly; for then the firſt Nomination is diſolved by the death of any one of them, the *defunct* not having truſted any one, and for the ſame reaſon, if a certain number be declared a *Quorum*, the Nomination fails, if ſo many dye as that this number *ſurvives* not, nor does the *Office Accreſſe* to ſuch as *Survive*.

Slavery & patria poteſtas

We have little uſe in *Scotland*, of what the *Inſtitutions of the Roman Law* teach, concerning *ſlavarie*, or *Patria poteſtas*, for we as *Chriſtians* allow no Men to be made *Slaves*, that being contrare to the *Chriſtian liberty*; And the *Fatherly power* or *Patria poteſtas* has little effect with us; for a *Child*

Child in *Familie* with his *Father*, acquires to himſelf and not to his *Father*, as in the *Civil Law*. Book 1. Tit. 5.

THE SECOND BOOK.

TIT. I.

Of the Diviſion of Rights, and the ſeveral ways by which a Right may be acquired.

BEing to treate in the *ſecond Book* of things themſelves, to which we have *Right*, and how we come to have *right to them*, It is fit to know;

That *Dominium* or *Property is the power of Uſing and Diſponing what is ours, except in*

Book 2. Tit: 2: *ſo far as we are reſtricted by Law or Paction*; And the Law deſigning the general good, allowes us not to uſe our own, ſo as thereby chiefly to prejudge our Neighbour. *Et in æmulationem vicini.*

The property of every thing belongs to ſome Perſon or Society and cannot flot in an uncertainty: *Nam dominium non poteſt eſſe in pendenti.*

Diviſion of things

Some things do not fall under *commerce*, and ſo we cannot acquite any *property* in them, ſuch as things common, as the *Ocean*, (though our *King* has *Right* to our narrow *Seas*, and to all the *Shoars.*) *Secundo*, Things publick which are common only to a *Nation or People, as Rivers, Harbours, and the Right of Fiſhing*, in the ſaids *Rivers. Tertio*, *res univerſitatis*, which are com-

common only to a *Corporation* or *City*, as a *Theater*, or the *Mercat place*, and the like: *Quarto*, Things that are ſaid to be no *Mans*, but are *Juris Divini*, which are either *ſacred*, ſuch as the *Bells of Churches*, for though we have no conſecration of things ſince the *Reformation*, yet ſome things have a *Relative Holineſs* and *Sanctity*, and ſo fall not under *Commerce*; that is to ſay, cannot be bought and ſold by *Private Perſons*. *Quinto*, Things that are called *ſanctæ*, ſo called, becauſe they are *guarded from the injuries of Men*, by ſpecial *Sanctions*, as the *walls of Cities*, *Perſons of Ambaſſadours*, and *Laws*. *Sexto*, Things *Religious*, ſuch as *Church Yards*. Book 2. Tit. 2.

As to thoſe things which fall within *Commerce*, we may *acquire right to them*, either by waves of acquiring property

Book 1: Tite 1: the *Law of Nature, and Nations*, or by our *Civil and Municipal Law*, *Dominion* or *Propertie* is acquired by the Law of Nations either by our own *fact and deed*; or *Secundo* by a *connexion* with, or *dependence* upon *things* belongiug to us, the firſt by a *general terme* is called *Occupation*, and the laſt *Acceſſion*.

Occupation. *Occupation, is the appropriating and apprehending of thoſe things, which formerly belonged to none.* And thus we acquire *propertie* in *wild Beaſts*, of which we acquire a *Right* how ſoon we *apprehend them*, or are in the *proſecution* of them with *probability* to *apprehend* them, as alſo we retain a *Right* to them whilſt they remain in *our poſſeſſion*, and even after they have eſcapt, if they be yet *recoverable by us*.

Acceſſion. *Secundo*, Property comes by *Acceſſion*, as for *inſtance* a *houſe*, *built* upon

upon, or *Trees taking root in our ground*, & the *product* alſo of our *Beaſts* belong to us, and ground that grows to our ground becomes inſenſibly ours, and is called, *Alluvio* by the *Civilians*. And it is a general rule in Law, that *acceſſorium ſequitur naturam ſui principalis*; and yet a Picture drawn by a great Maſter upon another mans Sheet or Table, belongs to the *Painter*, and not to the Maſter of that whereon it is drawn; the meanneſs of the one ceding to the Excellency of the other. Book 1. Tit. 5.

There are many other ways of acquiring *Right* and *Property*, which may be referred either to *Occupation*, or *Acceſſion*; as if a man ſhould make a *Ship* of my *Wood*, it would become the *Makers*, and would not belong to me, to whom the wood belonged, and this is called

Book 1. Tit 4.

Specification.

Specification, in which this is a general Rule, that, *if the ſpecies can be reduced to the rude maſs of Matter, then the Owner of the Matter is alſo owner of the ſpecies, or thing made*; As, *if a Cup be made of another mans Silver, the Cup belongs not to the maker, but to the owner of the Mettle*; becauſe it can be reduced to the firſt *Maſs of Silver*, but if it cannot be reduced, then the *Species* will undoubtedly belong to him that made it, and not to the *Owner of the matter*, as *Wine* and *Oyl*, made of anothers *Grapes*, and *Olives*, which belongs to the *maker*, ſeing *Wine* cannot be reduced to the *Grapes of which it was made.*

Propertie is likewiſe acquired when two or moe Perſons mix together in one, what formerly belonged to them ſeverally, and if the *Materials mixed*

mixed be liquid, it is called by a ſpecial Name, *Confuſion*, as when ſeveral Perſons *Wines* are mixed and confounded together; but if the Particulars mixt be dry and ſolid, ſo as to retain their different ſhapes and Forms, it is called *Commixtion*, and in both Caſes, if the *Confuſion*, or *Commixtion* be by conſent of the *Owners*, the *body* or thing reſulting from it, is common to them all: but if the commixtion be by chance, then if the materials cannot be ſeparated, the thing is yet *common*; as when the *Grain* or *corns* of two perſons are mixed together by chance, here there muſt neceſſarly be a *community*; becauſe *the ſeparation is impoſſible*; but if two *Flocks of Sheep* belonging to different perſons ſhould by Accident mix together, there would be no

Book 2. Tit. 1.

Confuſion

Commixtion

Book 2. Tit. 1.

no *community*; but every man would retain right to his own *Flock*, seing they can be distinctly known and seperated, and these two wayes of *Acquisition* are by *Accession*.

Tradition.

The last, and most ordinary way of acquiring of Property, is by *Tradition*, which is defyned *a delivery of possession by the true owner, with a design to transfer the Property to the Receiver*, and this *translation*, is made either by the real delivery of the thing it self, as of a *horse*, a *Cup*, *&c.* or by a *Symbolick delivery*. As, is the *delivery of a little Earth and Stone in place of the Land it self*; For where the thing cannot be truly delivered the Law allows some *Symbols*, or *marks of tradition*, and so far is *tradition* necessary to the acquiring of the Property in such Cases, that he who gets

gets the laſt Right, with the *firſt tradition* is ſtill preferr'd by our Law. Book 2. Tit. 1

If he who was once *Proprietar*, does willingly quite his Right, and throw it away, (which the *Civil Law* calls *pro derelicto habere*,) the *firſt finder acquires a new Right*, *per inventionem*, or by finding it, by which way alſo men acquire *Right to Treaſures*, and *to Jewels* lying on the Shoar; and generally to all things that belonged formerly to no man, or were thrown away by them; But it is a *general Rule* in *Our Law that what belongs to no man, is underſtood to belong to the King.* Acquiſitio per inventionem.

Preſcription, is a chief way of *acquiring Rights* by the *Civil Law*; but becauſe, that *Title* comprehends many things, which cannot be here underſtood, I have treated of *preſcription* preſcription.

Book 2 Tit. 1.

tion amongſt the wayes of looſing Rights, it being upon diverſe Conſiderations, *Modus acquirendi & amittendi.*

We alſo acquire right to the *Fruits* of thoſe things which we poſſeſs, *bona fide*, if theſe Fruits were gathered in or uplifted, and conſumed by us whilſt we thought we had a good Right to the thing it ſelf, for though thereafter our Right was found not to be good; yet the Law judged it unreaſonable, to make us reſtore what we lookt upon as our own, when we ſpent it; and therefore, when this *bona fides* ceaſeth, which may be ſeveral wayes, eſpecially by *intenting* an Action at the *true owners inſtance*, we become anſwerable for theſe *Fruits*; though thereafter they be *percepti & conſumpti*, by us.

Bona fides.

Tit.

Tit. II

Of the Difference, betwixt Heritable, and Moveable Rights

HAving *in the former* Title *cleared, how we acquire* Rights, *we come now to the Diviſion of them.*

The moſt comprehenſive *Diviſion of Rights* amongſt us, is, that whereby they are divided into *Heritable*, and *Moveable Rights.*

Heritable and moveable Rights

Heritable Rights in a ſtrict ſenſe, are only *Lands*, and all ſumms of money, and other things which can be moved from one place to another are *moveable*, but that is only counted *Heritable* in a *Legal Senſe*, which belongs to the *Heir*, as all other things which fall

Book 2. Tit. 2.

fall to the *Executor* are *moveable*, and ſo ſums of money, albeit of their own nature they are *moveable*; yet if they were lent for *Annualrent* they were of old *reputed heritable*.

For underſtanding whereof it is neceſſar to know that albeit by the *canon Law* all *Annualrents* were forbidden, as being contrarie to the Nature of the thing, (money being barren of its own nature:) yet the reformed Churches do generally allow it; nor were the *Jews* prohibited to take *Annualrent* from *Strangers*.

Annualrent

Before the *year* 1641 all *Bands*, and *ſums*, bearing *Annualrent*, were *Heritable*, as to all effects ſo that the *Executor*, who is *Hæres in mobilibus*, had no intereſt in, nor ſhare of ſuch Bands, but they belonged intirely to the *Heir*; but

Bands Heritable and moveable

that

that *Parliament* finding that the reſt of the *Children*, beſide the *Heir* had no Proviſion by our Law, except an *equall ſhare* in the *Moveables*, they therefore ordaind that all *Bands for Summs of money ſhould be moveable, and ſo belong to the Executors; except either the Executors were ſecluded*, or the *debitor were expreſly obliged to infeft the Creditor*, which is likewiſe renewed ſince the *Kings Reſtauration* *: For in theſe caſes, it was clear that by the *deſtination* of the *Defunct*, (which is the great *Teſt* in this Caſe) theſe *ſumms* were to be *Heritable*; and yet all *ſums* bearing *Annualrent*, are ſtill *Heritable* in ſo far as concerns the *Fisk*, or the *Relict*; ſo that if a *Band* bear *Annualrent* to this day the *Fisk* cannot claime any right to it, as falling under the *Rebels ſingle Eſcheate*

Book 1. Tit. 6.

K. C. 2. Par. 1. Act. 32.

Heritable quoad Fiſcum & relictum.

Book 2. Tit. 2.

cheate, (whereby when he becomes *Rebel* all his *Moveables fall to the King*;) nor has the *Relict* any Right to a *third of them*, as she has to *a third of other moveables*, the Law having presumed that *Relicts* will be still sufficiently secured by their *Contracts*; but whether the *sum be Heritable*, or *moveable*, all the *bygone Annualrents*, and generally all *bygones* are *moveable*, as to all intents and purposes, and so fall to *Executors*, and to the *Fisk*, and to the *Relict*; because *bygone Rests* are lookt on as money lying by the Debitor, they being already payable, as all *Obligations* bearing a *tract of future* time belong to the *Heir*.

So far does the Law defer to the will of the *Proprietar*, in regulating whether a *sum* should be *Heritable*, or *moveable*; (the Law

Law, thinking that every man is best Judge how his estate should be bestowed;) that if a man destinate a sum to be imployed upon Land or Annualrent, this destination will make it Heritable, and to belong to his Heir; or though the sum was originally secured by a moveable band. yet it may become Heritable by the creditors taking a superveening heritable security for it, or by compriſing for his ſecurity; but yet the creditors deſign is more to be conſidered, than the ſepervenient right; as for inſtance, a ſum may be moveable ex ſua natura, and yet may be ſecured by an heritable ſurty; as in the caſe of bygone Annualrents, due upon infeftment of annualrent, which are unqueſtionably moveable of their own nature, and yet they are heritably

Book 2. Tit. 2.

ſums Herit: by deſtination

Book 2. Tit. 2.

tably ſecured; and even *Executors* may recover them by a real Action of *poynding* of the ground: And, if a *Wedſet* bear a *proviſion*, *that notwithſtanding of Requiſition*, *the Wedſet ſhall ſtill ſubſiſt*, the *requiſition* will make the ſum *moveable* though it continue ſecured by the *Infeftment*; as alſo, ſumes *ab initio Heritable*, may be ſecured by an *Acceſſory moveable ſecurity*, without altering their Nature; as for inſtance, if one take a *Gift of ſingle Eſcheat* for ſecuring himſelf in *Heritable* ſums; this does not alter the *Nature* of the former *Heritable Right.*

Though a ſum be *Heritable*, yet if the *Creditor* to whom it is due require his *money*, either by a *charge* or *requiſition*, it becomes *moveable*, for the *Law* concludes in that caſe, that the

the *Creditor* designs rather to have his *money*, than lying in the *Debitors hands* upon the former security; and if it were lying in money beside him it would be *moveable:* and a requisition to one of the *Cautioners* will make it *moveable*, as to the *Principal* and all the other *cautioners*; But a charge on a *Band* wherein *Executors* are *secluded*, will not make the sum *moveable*, *for the design of the Creditor is presumed to continue in favours of the Heir*, till the sum be payed, or the *Band innovated*; And for the same Reason, a Requisition used by a *Wife*, who has an *Heritable* sum, that falls not under the *Jus Mariti*, will not make it *moveable*, since it is presumed she designed only to get payment, but not to give it to her *Husband.* Book 2. Tit. 2.

But

Book 2. Tit. 2.

But if the *creditor* who r
quired his Money take annu
alrent after that *Requiſition*,
is preſum'd that he again alt
red his Inclination and reſo
ved to have it *Heritable*, and t
continue due by vertue of th
firſt Security.

Though a *Band* be *Heritabl*
as bearing *annualrent*, yet b
fore the *terme of payment* it
moveable, as to all perſons.

From all which it is clear
that ſome ſums are *moveable*
to the *Executor*, but not as t
the *Fisk* or *Relict*, and ſom
may be *moveable*, as to the *D*
bitor and his *Executors*, an
yet may be *Heritable* as to th
creditor and thoſe repreſentin
him, as for *inſtance*, an *obl*
gation, to *imploy a ſum* due b
a *moveable band*, upon *Land* o
annualrent for the *Hairs* of
Marriage, that ſum as to th

Credito

creditor would be *Heritable*, yet *quo ad* the *Debitor*, it would remain *moveable*. Book 2. Tit. 3.

TITLE III.

Of the Constitution of Heritable Rights, by Charters and Seasins.

HAving treated in the former Chapter of the difference betwixt *Heritable and moveable Rights*, it is now fit to begin with *Heritable Rights* as the more *Noble*.

Our *Heritable Rights* are *Regulated* by the *Feudal Law*, by which *Feudum*, which we call a *Few* was defined to be *a free and Gratuitous Right to Lands made to one for service to be* Feudum

Book 2. Tit. 3.

be performed by him: He who grants this *Few*, is in *Our Law* called the *Superiour*, and he to whom it was granted is called the *Vassal*; the *Superiours Right* to the *Fie* is called *Dominium directum*, and the *Vassals Right* is called *Dominium utile*, and if that *Vassal* dispone the Land to be holden of *himself*, then that other *Person* who *receives* that *Few*, is called the *sub-Vassal*; whereas the *Vassal* who granted the *Few* becomes the immediate *Superiour* to this *sub-Vassal*, and the *Vassals Superiour*, becomes the *sub-vassals* mediate *Superiour*, and is so called because there is another *Superiour interjected* betwixt him and the *sub-Vassal.*

Superior & Vassal.

Dominium directum & utile.

Sub-Vassal.

The *Superiour* dispons ordinarly this *Few* to be holden of him by a *Charter* and *Seasin*: The *charter* is in *effect* the *disposition*

poſition of the *Few* made by the *Superiour* to the *Vaſſal*, and when it is firſt *granted*, it is called an *Orignal charter* or *Right*, and when it is renewed; it is called a *Right* be *progreſs*, and proceeds either upon *Reſignation* when the Lands are *reſigned* in the *Superiours* hands for *new Infeftment*, either in favours of the *Vaſſall* himſelf, or of ſome *third partie*, or by *confirmation*, when the *Superiour* confirms the *Right* formerly granted, and if it is to be holden from the *Diſponer* of the Superiour that is called *à me*, and is a publict Right, and is ſtill drawn back to the date of the Right confirmed; But if the *Confirmation* be only of *Rights* to be holden of the *Vaſſal*, it is called, *de me*, and is a baſe Right, the effect of this *Charter* being to ſecure againſt

Book 1. Tit. 5.

Book 2. Tit 3. *Forfaulture* or *recognition* of the *Superiour*, all which are voluntar *Rights*; but if they be granted in obedience to a *Charge* upon *Appriſing* or *Adjudication*, they are neceſſar..

If the *Charter* contains a Clauſe *de novo damus*, then it has the Effect of an *Original Right*, and ſecures againſt all Caſualities due to the *Superiour*.

Cauſe onerous and lucrative.

In *Charters* the firſt thing expreſſed is for what Cauſe it was granted, and if it was granted for Love and Favour, *Our Law* calls that a *lucrative Cauſe*, or for a Price, and good deeds, this we call *an onerous Cauſe*.

Diſpoſitive Clauſe.

The ſecond thing conſiderable in a *Charter*, is the *diſpoſitive Clauſe*, which contains the Lands that are diſponed; and *regularlie* with us, the *Charter* will give Right to no Lands, but what are contained in

in this Clauſe, though they be enumerated in other places of the Charter. Book 2. Tit. 3.

The third Clauſe is that wherein is expreſt the way how the Lands are to be holden of the *Superiour*, and this is called the *Tenendas*, from the firſt word of the *Clauſe*. Tenendas.

The fourth *clauſe* is that which expreſſes what the *Vaſſal* is to pay to the *Superiour*, and this duty is called the *Reddendo*, becauſe the Clauſe whereby it is payable begins, *Reddendo inde annuatim*. Reddendo.

The fifth *Clauſe*, is the *clauſe of Warandice*, which is either *Perſonal* or *Real*; *Perſonal Warrandice*, is when the *Author* or *Diſponer* is *bound perſonally*, and is either *Simple warrandice*, which is only from *ſubſequent* and *future deeds* of the *Granter*; and this *Warrandice* is implyed Warrandice Perſonal and Real. Simple Warrandice

Book 2. Tit: 3: in *pure donationes*; Or *secundo*, *Warrandice* from *Fact* and *Deed*, which is, that the *Granter hath not done, or shall not do any deed prejudicial to the right warranted.* Or *tertio*, *Warrandice is absolute*, and that is, *to warrant against all Mortals*: and in absolute *warrandice*, this is a rule, that an *Adæquate Onerous cause presumes still absolute warrandice*; But *absolute warrandice in Assignations* imports only that the *debt is truely due, and not that the Debitor is solvent.*

Warrandice from Fact and Deed.

Absolute warrandice.

All Rights granted by the King are presumed to be Donations, and import no Warrandice.

Real warrandice.

Real warrandice is when *Infeftment of one Tenement is given in security of another.*

The effect of Warrandice is, that if the thing warranted be taken away, there is competent to

to the Partie, to whom the Warrandice is granted, an *action of eviction.* Book 2 Tit. 3.

As *warrandice* infers *relief*, ſo *Excambion* infers *Regreſs*, that is to ſay, the Partie from whom the *excambed lands* are evicted, either by a Deed of the *Excamber*, or a detect of the Right, *has regreſs and recourſe to the lands which he excambed with* the *lands which are evicted*; And this ariſes from the nature of the *excambion* without expreſs paction, and is *competent too, as well as againſt the ſingular Succeſſors of Excambers and their Heirs.*

Becauſe *Tradition* is requiſite to the compleating of all rights; therefore the Charter contains a Command by the *Superiour* to his Baily; to give *actual ſtate and ſeaſin* to the *Vaſſal*, or to his *Atturney.* By *tradition of Earth* Precept of Seaſin

Book 2. Tit. 3. *and Stone*, and this is called the *precept of Seaſin*, and upon it the *Vaſſal*, or ſome other perſon having a *Procuratory* from him, gets from the *Bailly earth and ſtone* delivered, in preſence of a *Notar* and *two witneſſes*, which *Inſtrument* is called a *Seaſin*. And if the *Superiour* gives *Seaſin* himſelf, it is called a *ſeaſin*, (*propriis manibus*;) ſo that a Formal *ſeaſin is the inſtrument of a Notar, bearing the delivery of earth and ſtone, or ſome other Symbols by the ſuperiour, or his Baily to the Vaſſal*, or his *Atturney*, the Tenor whereof is known and fixt, and now by a late *Statute the witneſſes muſt ſubſcribe the Inſtrument* *; and thus the *Vaſſal* ſtands *Infeft* in the Land by *Charter* and *ſeaſin*.

Seaſin

Seaſin propriis manibus.

*K C. 2 par. 3 Act 5.

This *ſeaſin* being but the *aſſertion of the Notar*, proves not; except the warrand of it, that is

is to say, the *precept* or *disposition* whereon it proceeded be produced; but a *Seasin* given by a *Husband* to his *Wife*, or by a *superiour* to his *Vassal*, *propriis manibus*, (without a *Precept*) is sufficient, when the *competition* is with the *Granters* own *Heirs*; or with no more *solemn Rights*; and is not exorbitant, and after 40. *years* there is no necessity to produce either *precept* of *Seasin*, or *Procuratory* of *Resignation* by a special *statute**. Book 1. Tit. 3. *K. J. 6 par. 14. Act 214

This *Seasin* must be Rigistrated within 60. dayes, either in the general *Register* at *Edinburgh* or in the particular *Register* of the *Shire*; *Stewartry* or *Regality* where the Land lyes, * els the Right will not be Valid, against a *singular successor*; that is to say, if any other person buy the Land, he will not be obliged to take notice of *K. J. 6 par. 23. Act 16.

Book 1. Tit. 3. of that *ſeaſin*: But the Right will ſtill be good againſt the Granter and his *Heirs*.

If *Lands* lye *Diſcontigue*, every *Tenement* muſt have a ſpecial *Seaſin*) except they be *united* in one *Tenement*; and then one *Seaſin* ſerves for all; if there be a ſpecial place expreſt, where *Seaſin* ſhould be taken; but if there be no place expreſt; then a *Seaſin* upon any part will be ſufficient, for the whole *Contiguous Tenements*, (theſe being naturally unite;) but will not be ſufficient for Lands, lying *diſcontigue*; And one *Seaſin* will ſerve for all *Tenements*, of one kind; but where they are of ſeveral kinds as Lands, Milnes, or holden of different Superiors, or by a different holding of the ſame Superior, theſe (though *contiguous*;) *&c.* Will require ſeveral

Book 1: Tit. 3:

several *Seasins*; The *Symbols* of Possession being different, for Lands pass by the *Tradition* of *Earth* and *stone*, and *Milnes* by the *clap* and *happour*.

Sometimes *Lands* are erected into a *Barronie*, (the nature of which is explained before, *Tit. Inferiour Judges*,) and whensoever this is granted, *Union* is implyed as the lesser degree. Erection in a Barronie.

Erection in a *Barrony* can only be by the *King*, and is not *Communicable* by any *Subaltern rights*, albeit the whole *Barrony* be disponed tho the *Union* may be thereby *Communicated*.

This *Union* can only be granted by the *King*, which he may grant either *Originally*, or by *Confirmation*; and being so granted it may be *Transmitted*, by the *Receiver* to a *Sub-Vassal*;

Book 2. Tit: 3: but if a part of the Lands united be disponed, the whole union is not dissolved, but the Part disponed only; and this *Union* and all other Privileges and Provisions, can only be granted in the *Charter*; but not in the *Seasine*.

Real Rights being thus established by *Charter*, and *Seasine*, are not affected, or burdened by *Back bands*, or other personal Declarations; so that singular Successors are not obliged to take notice of them; But till they are so compleated, such Declarations (though personal) do affect them, and are valid against singular Successours: But they affect personal Rights, such as *Bonds* or *Contracts*; even though they be not intimated.

Tit. IV.

Tit. IV.

Of the ſeveral Kinds of Holding.

THe firſt *Diviſion* of *Feus* from the *ſeveral kinds of holding*, is that ſome Lands hold *ward*, ſome *Feu*, ſome *Blench*, and ſome *Burgage*. Diviſion of ſews.

For underſtanding *ward-holdings*, it is fit to know, that at firſt all *Feus* were Rights granted by the *Longo bards*, and the other *Northern Nations*, (when they conqueſt *Italy*) to their own Souldiers for ſervice to be done in the *Warrs*; and therefore *Ward-holding* which is *the propereſt holding*, is called *ſervitium militare*; and all Lands are Ward.

Book 2 Tit. 4. are therefore presumed to hold *ward*, except another holding be expreſt; and *ſervitium debitum & conſuetum*, is interpreted to be *ward holding*.

The Advantages ariſing to the *Superiour*, by the *ſpeciality of this holding*, are that the *Superiour* has thereby the full *meals* and duties of the *ward lands*, during the years that his *Male-Vaſſal* is *Minor**; for the *Feu* being given originally to the *Vaſſal*, for *Military ſervice*, it returns to the *Superiour*, during *Minority*; becauſe the Law preſumes, that the *Minor* is not able to ſerve his *Superiour* in the *Wars*; but in *Femal Vaſſals*, this *Caſuality* laſts only till 14 *years compleat*; becauſe they may then *marry Husbands*, who may be able to ſerve the *Superiour*, and this properly is called the *Caſuality of ward*; *for*

*Q. Ma Par. 3. Act. 5. K. Ja. 6 Par. 2 Act 42.

Marriage

Marriage, is due in other *holdings*, as ſhall be cleared in the next *Title*. Book 2. Tit. 4.

Sometimes the *Superiour* is content to acccept a *liquid quota*, or *annual preſtation* in place of the Meals and Duties that fall to him by the *ward*, and this holding is called *Taxt-ward*; The Marriage is alſo taxt in that Caſe to a particular ſum; But though theſe taxt *ward* and taxt Marriage Duties become *debita fundi*, they being expreſt in the *reddendo*; yet becauſe the holding remains ſtill a *ward-holding*, therefore Lands holding *Taxward* recognoſce, if they be diſponed without conſen of the Superiour. When a *Vaſſal* holds immediately *ward* of the *King*, and a *Subvaſſal* holds *ward* of that *Vaſſal*, this is called *black ward* or *ward* upon *ward*.

Feu

Book 2 Tit. 4.

Feu holding.

Feu holdings, is that whereby the *Vaſſal* is obliged to pay to the Superiour a *ſum of Money* yearly, in name of *Feu dutie nomine Feudi firmæ*

This holding has ſome *Reſemblance* with the (*Emphyteoſis*) in the *Roman Law*; but is not the ſame with it; for *Emphyteoſis* was a perpetual *Location*, containing a Penſion, as the *hyre* which was granted, for *improving* and *cultivating barren Ground*; but our *Feu holding*, comes from the *Feudal Law*, (whereof there is no veſtige in the *Civil Law*,) and paſſes by *Infeftment* to *Heirs*.

Emphyteoſis.

Blench-Holding, is that whereby the *Vaſſal* is to pay an *Eluſory duty*, meerly for acknowledgement, as a *penny*, or a *pair of Gloves*, *nomine albæ firmæ*, and ordinarily it bears, *ſi petatur tantum*.

Blench holding

These

These *Blench duties* are not due, whether they be of a *yearly growth*, or not; except they be required *yearly* by the *Superiour* *, as for instance, if the *Blench duty be yearly Attendance at such a place, or a Rose yearly, the Superiour can seek nothing for his blench duties, except he required the same within the year*; But the *Exchequer* now puts a value upon evry *Blench Duty* that can be estimated such as *Gloves*, or *Spurrs*, and exacts them for all bygone years, within *Prescription*; though they be not required yearly. Book 2. Tit. 4. *K. J. 6 Par. 18. Act 14.

Burgage holding, is that *duty* which *Burghs Royal* are obliged to pay to the *King*, by the *Charters, erecting them in a Burgh Royal*, and in this the *Burgh* is the *Vassal*, and not the particular *Burgesses*, and the *Bailliffs* of the *Burgh* are the *Kings* Burgage holding

Bail-

Book 2. Tit. 4. *Bailiffs*; nor can *Seasin* in *Burgage Lands*, be given by any other than the *Bailly*, and *Town Clerk**, if the *Town* have any and they must be *Registrated*, in the *Town Clerks Books**.

*K. J. 6 Par. 1. Act 27.

*K. C. 2 Par. 3. Act 11.

Mana am mor tuam Mortification.

When Lands are Mortifyed (which we call *ad manum mortuam*) to Churches, Hospitals or other pious uses; the Society to which the Mortification is made, becomes *Vassal*, and the *reddendo* being only *Præces & Lachrymæ*, and the Society never dying the Superiour loses many Casualitys of the Superiority; wherefore Lands cannot be mortifyed without the Superiours Consent

Title V.

Title. V.

Of the Caſualities, due to the Superiour.

THe *Feu* being thus ſtated by the *Superiour*, in the *perſon of his Vaſſal*, it will be fit in the next place, to conſider, what Right the *Superiour retains*, and what Right the *Vaſſal acquires* by this *Conſtitution of the Fie.*

The *Superiour* retains ſtill *dominium directum* in the *Feu*, and the *Vaſſal* has only *dominium utile*, and therefore the *Superiour* is ſtill infeft aſwell as the *Vaſſal*; But the *King* needs not be infeft; for he is infeft *jure Coronæ*, in all the Lands of *Scotland*, that is to ſay, his being *King, is equivalent to an Infeftment.* The

Book 2. Tit. 5.

The Superiour has different advantages and rights, according to the different manner of *Holdings*, and there are ſome Rights and Caſualities common to all *Holdings*.

Ward-holdings gives the *Superiour* a right to the Meals, and Duties of his *Vaſſals lands*, dureing all the years that his *Vaſſal* is *Minor*; and this is properly called the *caſuality of Ward*; but the *Superiour* or his *Donatar* are obliged to entertain the *Heir*; if he have no other Feu, or Blench lands; and to uphold the houſe, parks, *&c.* in as good condition as they found them; and muſt find caution for that effect *.

*K. J 4. par. 3. Act 25 K. Ja. 6 par. 4: Act 15.

If the *Vaſſal* ſells or diſpones the half of his *Ward lands*, to any except his *appearand Heir*, who is *alioqui ſucceſſurus*, without the conſent of his *Superiour*, the

the whole *Ward lands* fall to the *ſuperiour for ever*; and this we call * *Recognition*, which is introduced to puniſh the ingratitude of the *Vaſſal*, who ſhould not have *diſponed* the Lands which is *preſumed he got gratuitouſly from the ſuperiour* without his own conſent; and to ſhun this, the *Vaſſal* in *ward Lands* gets the *ſuperiours confirmation*, before he takes *infeftment*; for if he take *infeftment* before he be confirmed, the *lands recognoſce*, as ſaid is; ſince the *Vaſſal* ſhows ſufficiently his ingratitude by the very taking of the *infeftment*. But if the *ſeaſin* be null in it ſelf; it infers no *Recognition*: Becauſe in that caſe there is no Right Tranſmitted.

Book 2 Tit. 5.

Recognition.

* Statuta Rob. 3. cap. 19.

And though the *Vaſſal* at firſt did not ſell the half without the *ſuperiours* conſent; yet, if he

Book 2. Tit. 5. he thereafter ſells as much as will extend to more than the half of the *Feu*, the *firſt buyer* will likewiſe looſe his *Right*, if it was not *Confirmed* before he took *infeftment*. And this holds even where the Lands are but *Wadſet*, though the *Back-Tack duty* does not extend to the equal half of the value of the lands, if the lands *wadſet* exceed the major part of the Tenement; But *alienation* of Teinds, or accepting a right from the *Vaſſal* poſterior to the deeds inferring *Recognition*, infers not this *caſuality*, becauſe they are not *holden ward*.

Not only a *confirmation*, or *Novadamus*, (if it expreſs *Recognition*) but the *Superiour* accepting *ſervice*, or purſuing for the *caſualities*, are a paſſing from the *Recognition*; becauſe they infer the *ſuperiours* ac-

Nova-damus.

know-

knowledgement of the *Vaſſals Right*. And *Inhibition* raiſed and Executed, before the *Recognition* be incurred; ſecures againſt the ſame by a Late *Statute*. Book 2, Tit. 5. * King James 7 par. 1. Act 4.

Recognition takes place in *taxt-ward*, as well as *ſimple-ward*, but in no other manner of holding; except the ſame be expreſly provided in the *Vaſſals Charter*, *for ward holding* is preſumed to be the only proper *Feudal Right*.

If the *Vaſſal* denyeth the *ſuperiour*, he loſſes his *Feu*, and this is called, *diſclamation* *; but any probable ground of *ignorance* will take off this *Forfeiture*. * Diſclamation. Statute Rob. 3. cap. 18. Reg. Majeſt. lib. 2. cap. 63. Par. 6. & 9.

If the *Vaſſal* who holds *Ward Lands* dyes, having an *Heir unmarried*, whether *minor*, or *major*, the *ſuperiour* gets the value of his *Tocher*; though he offer

Book 2. Tit. 5.

offer him not a *Woman* to be his *Wife*; but if the *superiour* offer him his *Equal*, for a *Wife*, and he refuses to accept her, and Marries any other person; the *superiour* gets the double of his *Tocher*, and one of these *casualities* is called the *single Avail of the Marriage*, and the other, the *double Avail of the Marriage*; but the *modification* of this is referred to the *Lords of Session*, who consider still what was the *Vassals free rent*, all debts deducted, and the *ordinarie modification* of the *single Availe*, is about two *years rent*, of the *Vassals free Estate*, even though the *Heir* was *Heretrix*; and the *double Availe* is but a year more which is 3 *years free rent*: And though there were moe *Heirs portioners*, there will only one *availe be due for them all.*

Avail of the Marriage.

The single and double Avail of the Marriage.

Though

Though this *Caſualitie of Marriage*, be ſtill due in all *ward holdings*, yet they may be due by *expreſs paction* in other *holdings*, and there are many in *Scotland*, who hold their *Lands Feu*, *cum maritagio*; and in both caſes, the *Marriage is debitum fundi.* Book 2. Tit. 5.

Though as to the *Caſuality* of *ward*; every *ſuperiour* has Right to the *ward Lands holding* of himſelf where the *Vaſſal* holds *ward Lands*, of moe *ſuperiours*; Yet the *caſualitie* of Marriage falls only to the *eldeſt ſuperiour*; becauſe there cannot be moe Tochers than one; and he is the *eldeſt ſuperiour* from whom the *Vaſſal* had the firſt *Feu*; but the *King* is ſtill preſumed to be the *eldeſt ſuperiour*; becauſe, all *Feus* originally flowed from him.

It

Book 2. Tit. 5.

It is thought that the Reaſon why this *caſuality* is *due*, was, becauſe it was not Juſt, that the *Vaſſal* ſhould bring in a ſtranger to be *Miſtreſs of the Feu*, without the *ſuperiours conſent*; for els he might choice a *Wife* out of a Family that were an enemy to the *ſuperiour*; but I rather think, that both *ward*, *and Marriage*, proceeded from an *expreſs paction*, betwixt *King Malcome Kenmore* and his Subjects, when he firſt *Feued* out the whole *Lands of Scotland*, amongſt them; as is to be ſeen in the firſt of his *Statutes* *.

* Leg. Milcol. cap. 1.

Feu Duty.

The ſpecial duty ariſing to the *ſuperiour* in a *Feu holding*, is, that the *ſuperiour* gets a *yearly Few duty* payed to him, and if no part of this *Few duty* be payed for three years, then the *Vaſſal* looſes his *Feu*, *ob non ſolutum*

ſolutum Canonem; for the *Feu duty*, is called *Canon*; and if this proviſion be expreſt in his *Charter*, he will not be allowed to purge this *irritancy*, by offering the bygones at the *Barr*; but though this *proviſion* be not expreſt in the *Charter*, yet the *Feu* will be annulled for not payment of the *Feu-duty*, by an expreſs Act of Parliament*; but the *Vaſſal* in that Caſe will be allowed to purge at the *Bar*, and the reaſon of this difference is; becauſe the *expreſs paction* is thought a ſtronger Tye than the *meer ſtatute*. Book. 2 Tit. 5. *K. J. 6 Par. 15. Act 246

Clauſe irritant.

A *Clauſe irritant* in *our Law*, ſignifies any *proviſion*, which makes a *penalty* to be incurred, and the *Obligation* to be null for the future; as where the *Superiour* gives out his *Feu* upon *expreſs Condition*, that if the *Feu-*

Book 2 Tit. 5:

dutie be not payed, the *Feu* ſhall be *null*, and *reduceable*, and a *Clauſe reſolutive*, is a *proviſion*, whereby the *Contract* to which it is affixt, is for not *performance*, declared to have been *null* from the beginning.

Clauſe reſolutive.

The *Caſualities* that are due, by all manner of *holdings*, and which ariſe from the very *nature of the Feu*, without any *expreſs paction*, are *None-entry*, *Relief*, and *Liferent Eſcheate*.

None-entry.

None entry, is a *caſuality* whereby the *Superiour* has Right to the Meals and Duties of the Lands, when there is not a *Vaſſal* actually entered to the Lands, or where the *Vaſſals* Right is reduced after he is entered; and the reaſon why this is due to him, is, becauſe, he having given out his *Feu* to his *Vaſſal* for ſervice, when there is no *Vaſſal* entered, the

Law

Law allows him to have recourſe to his own *Feu*, that he may therewith provide himſelf a *Vaſſal*, who may ſerve him; but though the full Rents of the Lands be due to the *Superiour*, from the very time that he cites his *Vaſſal* to *hear* and *ſee* it found and declared, that the Lands are in *Nonentrie*; yet before that *citation*, the *Superiour* gets only the *Retoured Duties*; and the reaſon of the difference is; becauſe after *citation*, there is a greater contempt than before, and ſo is to be more ſeverely puniſhed. Book 2. Tit. 5.

For underſtanding which *retoured dutie*, it is fit to know, that there was of old, a *general valuation*, of all the *Lands of Scotland*, but thereafter there was a *new valuation*, the firſt whereof is called *the old*, and Retoured Duty.

Book 2. Tit. 5.

the second, *the new Extent*, and both are call'd the *retour'd duty*, because they are expreſt in the *Retour*, or (*Return*) that is made to the *Chancellary*, when an *Heir is ſerved*; but both are very far below the *Value*, to which Lands are now improved, though in *Our Law*, the *new Extent* be conſtructed to be the value: But if the Lands be not retoured, the Donatar to the *None entrie*, will have Right to the ful mails and duties even before Citation; The *old Extent* is ſaid to be made *tempore pacis*, and the *new Extent*, *tempore belli*; and the moſt probable reaſon of theſe *terms* is, that the firſt *Valuation* was very mean being made in time of peace; But our *Kings* being engag'd thereafter in war with the *Engliſh*, there was a new valuation made, much greater

than

than the firſt, to augment the *Revenue* for maintenance of the *War*: And therefore the new Extent or Valuation, is ſaid to be made *tempore belli.* Book 2. Tit. 5.

But in an *infeftment of annualrent*, the whole *annualrent* is due, as well before *declarator*, as after; becauſe the whole *annualrent* is the *retoured duty*, it being *retoured*, *valere ſeipſum*; and that is called *an infeftment of annualrent*, when the *Vaſſal* is not infeft in the *property* of the particular *lands*; but is infeft in an *yearly annuity of money*, to be pay'd out of the *lands*, as for inſtance, if a man ſhould be infeft in the ſum of *five hundred merks yearly*, to be payable out of any particular *Lands*, being worth 500. merks yearly, how ſoon the Vaſſal who had right to the 500. merks dyed, the Superiour would have right

Infeftment of Annualrent

Book 2. Tit. 5. to the whole *annualrent* yearly, until the Heir of the Vassal be entered. *vide infra Tit. Redeemable Rights.* § *annualrents.*

There is no *Non-entry* due in *Burgage Lands*; because the *Burgh* it self is *Vassal*, and never dyes, and so therefore, neither does the *Burgh* nor any private *Burgess* pay *nonentrie*, the duty payable by the *Burgesses* being onely *Watching* and *Warding*: And yet their liferent as well as *single Escheats* falls to the *King*. The *nonentrie* subsequent to the *Ward*, is of the nature of the *Ward*, and if the *Superiour*, or *Donatar* were in possession, they have right to the full *Mails* and *Duties*, without any *Declarator*; But in that case the *Donatars right*, extends only to three *Terms subsequent* to the *Ward*, after which there is place to a *Second Donatar*. when

When the *Vaſſal* enters, he pays an acknowledgement to the *Superiour*, which is called, *Relief*, becauſe its payed for relieving his *Land* out of the *Superiours hands*. It is *debitum fundi*. and affects not only the *ground really*, but the *Vaſſal Perſonally*, who takes out the precept for infefting himſelf; though he never takes *infeftment* thereupon. Book 2. Tit 5. Relief.

The value of this Caſuality varies, according to the nature of the holding, for in Blench and Feu holdings, it is only the double of the *Feu* or *Blench duties*; but in *Ward-holdings*, it is the full duty of the Land; if the *Superiour* be in poſſeſſion, the time of the *Vaſſals entry*; but if the *Superiour* was not in *poſſeſſion*; even though the *Vaſſal* was minor,

Book 2 Tit. 5.

then the *Superiour* gets only the *Retoured* Duty; and it is so far from being presumed to be *remitted* by the *Superiours* entering his *Vassal*; that it *is* still exacted by the *Exchequer*; though it be gifted with the other *Casualities*.

Life Rent Escheate.

For understanding *Life rent Escheates*, it is fit to know, that when any man does not pay a *debt*, or perform a *deed* conform to his *Obligation*, his *Obligation* is *registrated*; if it carry a *Consent* to the *Registration* in the body of it; or if it do not, there must be a *sentence recovered*, and upon that *Registrated writ*, or *decreet*, (for a *Registrated writ* is a *Decreet* in the *Construction of Law*) there will be *Letters of Horning* raised, and the *Party* will be charged, and if he pay not within the dayes allowed

allowed by the *Charge*, he will be *denounced Rebel*, and put to the *Horn*, and from the very date of the *denunciation*, all his *moveables fall to the King by a Caſuality*, which is called *ſingle Eſcheate*; but now ſingle *Eſcheates* fall likewiſe to *Lords of Regalities*, if the perſons *denounced* live within a *Regalitie*, becauſe the *King* uſes to gift all ſingle *Eſcheats* at the Erection; But if they be not expreſly gifted they remain with the *King*. Book 2. Tit. 5. Single Eſcheates.

Under the ſingle *Eſcheate* fall all ſums that are moveable *quoad Fiſcum*, and all bygone Annualrents, even of Heritable ſums and the bygone Rents of Lands, together with the Crop that is upon the Ground, the time of the *Rebellion*, and the Mails and Duties due at the Term, immediately ſubſequent to the *Rebellion*.

Book 2 Tit. 5. If the *Vassal* continue year and day *Rebel*, without *Relaxing* himself, (which *Relaxation* is expeded by *Letters* under the *Kings Signet*, expresly ordaining him to be *relaxed from the Rebellion*;) then he is esteemed as *Civilly dead*; and consequently not being able to serve the *Superiour*, the Law gives the *Superiour* the *meals* and *duties* of his *Feu*, during all the days of the *Vassals* life; and this *Casuality* is called *Liferent Escheate*; so that every *Superiour* aswell as the *King*, has Right to the Meals and Duties of the Lands holden of himself * if his *Vassal* was once infeft; and even though he was not infeft; if he was *appearand Heir*, and might have been infeft; for his lying out should not prejudge his *Superiour*; but if a man have Right by Disposition

Relaxation.

*K. J. 5 Par. 4. Act 32.

ſition, whereupon no Infeſtment followed, the *King* only will have right to his *Liferent Eſcheate*, Since the *ſingular Succeſſour*, not being yet infeft by the *Superiour*, of whom he is to hold his Lands, that *Superiour* cannot have Right, and *conſequently* their Liferent falls to the King; And the Liferent of Miniſters, in ſo far as concerns their *Manſes* and *Gleibs*, falls alſo to the *King*, becauſe they require no Infeftment, and are not holden of any other *Superiour*; but all *heritable* and *Liferent Rights*, requiring no Infeftment of their own Nature, ſuch as a *Terce*, and *Life-rent-tacks* fall not to the *King*, and *Life-rent-tacks* fall to the *Maſter of the ground*, and the *Life-rent* by *Terce* pertains to the *Superiour* during the Life-renters lifetime *. Book 2. Tit. 5. *K. J. 6 Par. 22. Act. 15.

This

Book 2. Tit: 5:

This *Life-rent Escheate* comprehends only *Rights*, to which the *Vassal* himself had right for his *Lifetime*; for else it will fall under *single Escheate*; (*single Escheates* comprehending every thing that is not a *Liferent Escheate*;) and therefore, if the *superiour* having right to the *Vassals Liferent Escheate*, become *Rebel* himself, the *Vassals Liferent Escheate* will fall under the *Superiour single Escheate*, for the *Superiour's* had not right to those *meals* and *duties* during all the dayes of his own *Lifetime*; and so it could not fall under his *Liferent*, and the like, does for the same reason hold in all such as have assignations to Liferents, or to Liferent Escheats, or to Tacks for any definit number of years, few or many.

The

Book 2. Tit. 5.

The *Superiour* has alſo right to the *ſub-Vaſſals Liferent Eſcheate*, which falls after the *Vaſſals denounciation*, for by the *denounciation of the immediate Vaſſal*, the *Superiour* comes in his place; and ſo has right to the *ſub Vaſſals Liferent*: But if the *ſub Vaſſal* be firſt *denounced*, his *Liferent* falls under the *Vaſſals ſingle Eſcheat.*

The *Liferent Eſcheate falls* by the *Rebellion*, that is to ſay, by the *denounciation*; and the year and day, is given only to the *Rebel* to *relax himſelf*, ſo that if he *relax* not within that time, his *Liferent* will *fall from the denounciation.*

In Competitions betwixt the *Superiour* or the *Donatar*, and the *Rebells Creditors*, theſe Rules are obſerved in our Diviſions; Firſt, as to *ſingle Eſcheates* (which muſt be treated here

Book. 2. Tit. 5. here, for their Contingencie with Liferent Escheates, tho single Escheates fall not to the *King* as *Superiour*, but as *King*;)

No *Legal diligences* nor voluntar Rights, for payment of any debt contracted after *Rebellion*, will prejudge the *King* or his *Donatar*; since otherwise a *Rebel* at the *Horn*, might fraudulently contract debt to evacuat the *Escheate*.

2°. If a Lawful *Creditor* for a *debt*, *Prior* to the *Rebellion*, compleit his diligence before *Declarator*; he will be preferred to the *Donatar*.

3°. No *Voluntar Assignation*, (tho for a debt prior to the *Rebellion*, if granted after *Rebellion* and compleated by intimation before *Declarator* will be preferred to the *Donatar*; But actuall payment will be preferred if the debt was prior to the

the Rebellion & the payment obtained before Declarator. Book 2. Tit. 5.

As to *Life rent Eſcheats*, the Rules in Competitions run thus.

Primo, Tho the Debt was prior to the Denunciation, no voluntar Infeftment will prejudge the *Superiour*; except the *Rebel* was obliged prior to the *Rebellion*, to grant that Infeftment, and that the Infeftment it ſelf was exped within year and day of the *Denunciation*.

Secundo, Though *Legal diligence* be more favourable than *voluntar rights*; becauſe there is leſs *Colluſion*, yet no *legal diligence* will be preferred to the *Superiour*; except it was led for a debt prior to the *Denunciation*, and was compleated by Infeftment, or Charge, or that a Signature was preſented to the Exchequer (which in

Lands

Book 2. Tit. 5. Lands holding of the *King* is equivalent to a Charge since the *King* cannot be charged within year and day thereof; albeit the said *Legal diligence* was deduced after the *Denunciation.*

Though this be the Course in competitions, *quoad Life-rent Escheates*; yet actual payment made to, or Diligences done by Creditors for payment of Debts, prior to the *Rebellion*, or the commission of Crimes, will be preferred, to the *Donatar*; if these *Rights* or *Diligences* be compleated before *Declarator*, which we owe rather to the benignity of our *Kings*, than to the Nature of these Rights, since there is *jus quæsitum Fisco*, by the *Denunciation.*

Liferent Escheates is proper to all kinds of holding, except *Burgage*, and *mortification*,

For

for the *Vaſſal* being a *Societie* or *Incorporation* dyes not, and ſo can have no *liferent Eſcheate*; and albeit the *Adminiſtrators* were *denounced* for *debts* due by the *Incorporation*; yet that is ſtill preſumed to be their *Negligence*, which ought not to prejudge the *Society*. Book 2. Tit. 5.

For compleating this *Caſualitie* a general *Declarator* muſt be raiſed at the *Superiour* or *Donatars* inſtance, to hear and ſee it found and declared, that the *Vaſſal* was orderly denounced *Rebel*, and has continued at the *Horn* year and day: And in Competitions betwixt *Donatars* the laſt gift, if firſt Declared will be preferred.

If the gift be taken to the behove of the *Rebel* it is null, and it is preſumed to be to his behove, if he or his family be ſuf-

Book 2. Tit. 5. ſuffered to ſtay in poſſeſſion; or if the gift be procured by the *Rebels means*.

It is obſerveable in *Temporarie Caſualities* ſuch as *Ward*, *Nonentry*, and in all Conſolidations of the property, with the *ſuperiority* ſuch as *Recognitions*, *Baſtardies*, *ultimus hæres*; The *Feu* returns to the *Superiour*, burdened with all *real Rights*; to which he has conſented by Confirmation or otherwiſe: And with all theſe Rights which the Law hath eſtabliſhed, without either paction of Party, or conſent of *Superior*; ſuch as *Terce* and *Courtiſie*; And therefore ſuch Rights do in both caſes defend againſt the *Superior*: But when the *Lands* return to the *King by Forefaulture*, His *Majeſtie* is not obledged to acknowledge either *Terce* or *Courteſie*, or any other right

Right but what himſelf hath actually confirmed; and both the *King* and other *Superiors* have no more right by Liferent Eſcheate, then the *Vaſſal* himſelf had formerly; ſince they come only in the *Vaſſals* place, who by his *Rebellion* is rendered incapable to ſerve the *Superior.* Book 2. Tit. 5.

When theſe *Caſualities* are gifted by the *King*, the write by which they are Tranſmitted is called a *Signature*; (as all other rights are which paſſes his *Majeſties* hand, and they are ſo called, becauſe they are *ſigned* by him; And they muſt be written by Writters to the *Signet* and paſs the *Signet.*

If theſe *Signatures* contain only *Temporary Caſualities*, ſuch as gifts of *Ward*, *Marriage*, *Eſcheate*, *&c.* or only a right to *Move-*

Book 2 Tit. 5.

ables, they paſs only the *Privy Seal*, for what right Subjects tranſmit by *Aſſignations*, His *Majeſtie* tranſmits by the *Privy Seall*; But if the Right require a *Formal Diſpoſition*, and to be compleated by *Infeftment*, it muſt be tranſmitted under the *Great Seal*, and the *ſignatures* ought to expreſs what *Seals* they ſhould paſs. All great *Offices* and *Commiſſions* to *Judicatures* ſhould likewiſe paſs the *Great Seal*; Except it be otherwiſe provided by Law, as commiſſions of *Juſticiary*, which by Act of *Parliament* are allowed only to paſs the *Quarter Seal.*

This *Quarter Seal* was originally iuvented for *Sealing Writes*, which firſt paſſed the *Great Seal*, as Precepts of *Seaſing* upon *Charters* paſt the *Great Seal.* And is therefore called the

the *Teſtimonial* of the *Great Seal*, Book 2. and the ſhape of it is the fourth Tit. 6 part of the *Great Seal*; The *Great Seal* containes virtually the *Privy Seal*; and therefore tho when a Man is Forfeited, the right of his moveables ſhould be Tranſmitted by a Right under the *Privy Seal*, and the Right of his Lands under the *Great Seal*; Yet the Lords have found that the Right of the Moveables, may be tranſmitted in the ſame *Signature* with the Lands, if the moveables be therein expreſly diſponed and aſſigned.

Theſe *Seals* were invented to be Checks upon ſuch as obtain'd gifts from the *King* by *Subreption* or *Obreption*, that is to ſay, by concealing what is true, or expreſſing what is falſe: For even after the *ſignature* is paſt the *Kings* hand, it

Book 2. Tit. 6. it may be ſtopt in theſe caſes.

The laſt Priviledge of the *Superiour* is, that he may *force his Vaſſal to exhibite his Evidents*, to the end he may know what is the *nature of the holding*, and in what he is *lyable to him as his Superiour*, which proceeds ordinarly by an *Action of Improbation.* Whereby he will be forced to Exhibit, and produce his Evidents to ſhun the hazard of the Certification in the *Improbation.*

TITLE VI.

Of the Right which the Vaſsal acquires by getting the Feu.

THE *Vaſsal* by getting the *Feu* ſettled in his Perſon, by

by *Charter* and *Seaſin*, as ſaid is, has right to all Houſes, Caſtles, Towers, (but not Fortilaces;) Woods, and other things that are above ground of the Lands expreſly *diſponed*; and to Coals, Limeſtone, and other things within ground, and to whatever has been *poſſeſſed*, as *part* and *pertinent* of the Land *paſt Memory of Man*: But there are ſome things which paſſe not under the *general diſpoſitive words*, and require a *ſpecial Diſpoſition*, which belongs to the *King*, in an eminent way, and are called therefore *Regalia*, and are not preſumed to have been *diſponed* by his *Majeſtie*, or any other *Superiour*; except they were *ſpecially mentioned*, ſuch as are all *Juriſdictions*, Forreſts, Salmond-fiſhings, Treaſures hid within the ground, and Gold

Book 2. Tit. 6.

Regalia

Book 2. Tit. 6. Gold, Silver, and Fine lead; for other Mines, such as Iron, Copper, &c. belong to the *Vassal.**

J. 1. P. 1. Act 12. If lands be erected in a *Barrony* by the *King*, then though the lands lye *discontiguously*, one *seasin* will serve for them all, because, a *Barrony* implyes an *Union.*

This erecting them in a *Barrony*, will likewise carry a right to *Jurisdictions*, and *Courts*, *Fortalices*, *Forrests*, hunting of *Deer*, and Ports, with their small Customes, granted by the *King*, for upholding these Ports, Milnes, Salmond-fishings, &c. because; *Barronia est nomen universitatis*, and possession of any part of a *Barrony* is reputed possession of the whole; But Mynes of Gold, and Silver, * Treasures, and goods confiscated, are not car-

*K. J. 1 Par. 1. Act 12.

carried with the *Barrony*. Book 2. Tit. 6.

The *Heritor* has alſo power to ſet *Tacks*, remove, and in-put *Tennents*, as a conſequence of his property.

Tack.

A *Tack is a Location, or contract, whereby the uſe of any thing is ſet to the Tacksman, for a certain hyre*, and in *Our Law* it requires neceſſarly, that the *terms* of the *Entry*, and the *Iſh*, muſt be expreſt, that is to ſay, when it ſhould begine and end, and it muſt bear a particular duty, elſe it is null; and if it be a *valid Tack*, that is to ſay, if *Write* be *adhibited*, (*verbal Tacks* being only *valid* for one year) and the thing ſet, the *Contracters names*, *Tack-duty*, *Iſh*, and *Entry*, clearly therein expreſt, and cloathed with *poſſeſſion*, it will defend the poor *Tacksman*, againſt

Book 2. Tit. 6. any *Buyer* *; which was *introduced in favours of poor Tennents*, for encouraging them to improve the *land*; but it will not defend againſt *a Superiour of ward lands*, *for the ward*, *&c.* though by *Act of Parliament*, the *Superiour* be obliged to continue them in their *poſſeſſion* till the next *term of Whitſunday* *.

*K. J. 2 Par. 6. Act 17.

*K. J. 4 Par. 3. Act 26. Albeit *Tacks* have not all the *ſolemnities* aforeſaid; yet they are *valid* againſt the *Granter* and his *Heirs*.

Tennants cannot aſigne their *Tacks*; except they be *Liferent Tacks*; or that the *Tack* bear a power to *aſſign*; but they may be compriſed, or *adjudged*; and if the *Maſter* ſuffer the *Tacksman* to continue after the *Tack* is expyred, he will be obliged to pay no more than he payed formerly during the *Tack*;

Tack; and this is called in *Our Law* the benefite of a *tacite Relocation*, that is to ſay, both the *Setter* and the *Tacksman*, are preſumed to deſign to continue the *Tack* upon the former terms, till the Tennent be warned. Book 2. Tit. 6. Tacite Relocation.

If the *Tack* be granted to *ſubtennents*; then the *Tacks-man* may ſet a *ſub-tack*, which will be as valid as the *principal-Tack*, if cloathed with *poſſeſſion*.

Rentals are alſo a kind of Tacks; but more favourable and eaſie; becauſe the *Rentaler* and his Predeceſſors have been *Ancient Poſſeſſors*, and *kindly Tennents*, and he payes a *Graſſume* or acknowledgement at his entrie, and yet they laſt no longer than for a year; if there be no time expreſt; and if they be granted to a Man and his Heirs; they laſt only to the Rentals

Book 2. Tit. 6. firſt Heir; for elſe they behoved *for ever to belong to the Heirs*; and ſo would want an *Iſh*; but no *Tack* is accounted a *Rental*; except it be in *write*, and the write bear the ſame.

Rentals cannot be aſſigned, except that power be granted in the *Rental*; and if the *Rentaler* aſſign, he looſes his *Rental*; though a *Tacks man* forfeits not his Right, by *aſſigning* it, the *Aſſignation* being only *null.*

When the years of the *Tack expire*, or though there be no Tack; yet the Maſter cannot *Sumarly remove his Tennent*, or *Poſſeſſor* except from *Life-rented Lands*, and *Houſes*, or *Towers*, and *Fortalices*, and *vitious Poſſeſſors* whom he can remove by a Summonds on ſix dayes; but in all other caſes he muſt warn him 40 dayes, before the *Term of Whitſunday*; tho

Removing ſolemn & ſummar.

tho the Term at which he were to remove, *by paction*, were *Mertinmaſs*, or *Candlemaſs*; which warning muſt be executed, that is to ſay, *intimated perſonally to the Tennent*, and upon the *ground of the Lands*; and at the *Pariſh Kirk*, immediately after Sermon; in both which places Copies of the Warning are to be left: and if he then refuſes, he muſt be perſued to remove *upon ſix dayes*, and after this citation, the Maſter will get againſt him *violent profits*; that is to ſay, the *double of the avail of the Tenement within Burgh*, and the higheſt advantages that the *Heritor* could have got, if the *Tennent* poſſeſſed lands, in the Countrey; nor will the *Tennent* be allowed to defend againſt this removing; till he *find caution* to pay the *violent profits**. Book 2. Tit. 6.

*Q. Ma Par. 6. Act 39.

Book 2. Tit. 6.

Tacit Hipotheque.

The *Master* has likewise a *Tacit Hypotheque* in the *fruits of the ground*, which he sets to his *Tennent*, in so far as concerns a *years dutie*, that is to say, they are *impignorated by the Law*, for that years dutie, and he will be preferred either to a *Creditor*, who has done Diligence, or to a Stranger who has bought them; though in a publick Mercat: And the *Lands-Lord* within Burgh, has a *tacit Hypotheque* in all the goods brought into his house by his *Tennent*, which he may retain, *ay*, and while he be payed of his *years rent*: which tacit *Hypotheque* the *Superiour* has also for his *Feu dutie*.

Title

Title. VII.

Of Transmission of Rights, by Confirmation, and of the Difference betwixt Base, and Publick Infeftments.

THE *Fie* being thus eſtabliſhed in the *Vaſſals* perſon, the ſame may be tranſmitted, either to *univerſal*, or *ſingular Succeſſours*; The firſt is properly called *Succeſſion*, which ſhall be handled in the third Book. *Tranſmiſſion of Rights*, to *ſingular Succeſſors*, is *voluntar* by *Diſpoſition*, and *Aſſignation*, or *neceſſar* by *Appriſing*, and *Adjudication*, and by *Confiſcation*, when they are *forfaulted for Crimes*. &c.

Wayes of tranſmitting Fies.

If the *Vaſſal* ſells the Land, the *Superiour* is not oblidged to

Book 2. Tit. 6. receive the *Sub-Vassal* except he pleases, though the *charter* bear, to him and his *assignies*; and if he receive him, there is in *Law*, *a years rent due to the Superiour, as an acknowledgement for changing his Vassal.*

Lands are disponed, either to be *holden of the disponers Superiour*, and that is called a *publick Infeftment*; because, it is presumed it will be publickly known, being *holden of the Superiour*; and it is likewise called an *Infeftment*, *à me*; because, the *disponer* gives it to be holden *a me*, *de Superiore meo*, and this Infeftment is null, untill it be confirmed * by the *Superiour*, which is done by a *Charter of Confirmation*, wherein the *Superiour narrates the Vassals Charter*, and subjoyns thereto his own *Confirmation* or *Ratification of it*, and the last right being

Infeftment publick

*K. J. 6 Par. 5. Act 66.

being firſt confirmed is ſtill *preferred* *. Book 2. Tit. 7.

Sometimes alſo the *Vaſſal* Diſpones Lands to be holden of himſelf, and this is called *a baſe infeftment*, and has been allowed by *Our Law*, (contrarie to the principles of the *Feudal Law*,) in Favours of *Creditors*, who getting right for payment of their *debts*; were unwilling to be at the *expences* to get a *Confirmation* from the *Superiour*, and this is called, an *infeftment, de me*; becauſe, the *Diſponer* gives them *tenendas de me; & ſucceſſoribus meis.* * Act foreſaid

Baſe infeftment

Inf: de me

Theſe *baſe infeftments* being cloathed with *poſſeſſion*, are as perfect, and *valid*, as a *publick infeftment*; for poſſeſſion, is to an *infeftment* to be holden of the *Diſponer*, the ſame thing that *confirmation* is to an *infeftment* to be holden of the *Superiour*,

Book 2. Tit. 7.

riour; and therefore, as in a Competition betwixt two infeftments of the ſame Lands, to be holden of the *Superiour*, the firſt *confirmation* would be preferred, it being a general rule in *Law*, that amongſt Rights of equal perfection, *prior in tempore eſt potior in jure*; ſo if a *baſe infeftment* be cloathed with poſſeſſion before the *publick infeftment* be confirmed, the *baſe infeftment* will be preferred; though it was granted after the *publick infeftment*.

Poſſeſſ: Natural and Civil.

For the better underſtanding of the nature of *baſe infeftments*, it is fit to know, that *poſſeſſion* is in *Law natural*, or *Civil*, that is *Natural poſſeſſion*, by which a man is *Naturally*, and *Corporally* in *poſſeſſion*, as by labouring of the ground; but becauſe ſometimes Men could not

not attain to the *Natural poſſeſſion* for compleating their Rights, therefore the *Law* was forced to allow another *poſſeſſion* by the *mind*, as that was by the *body*, and this is called, *Civil poſſeſſion*; becauſe it is allowed, and introduced by the *Civil Law*, of which there are many kinds in *Scotland*; As, Book. 2 Tit. 7.

Primo, The obtaining *Decreets for Meals and Duties*, and even *citation* upon an *Heritable Right.*

Secundo, Payment of *annual-rent*, by the *debitor* to the *Creditor* who has *infeftment of annual-rent.*

Tertio, If a man be *infeft in lands*, and for *warrandice* of theſe lands be *infeft* in other lands, *poſſeſſion of the principal lands*, is reputed in the *conſtruction of Law*, *poſſeſſion of the warrandice lands.*

Quarto,

Book 2. Tit. 7.

Quarto, If a *Woman* be *infeft* by her Husband in a *liferent*, the *Husbands poſſeſſion* is accounted the *Wifes poſſeſſion.*

Quinto, If a Man *diſpone* lands, reſerving his own *liferent*, the *Liferenters poſſeſſion* is accounted the *Fiars poſſeſſion*; and a *baſe infeftment* is ſaid to be cloathed with *poſſeſſion*; if he who is infeft hath attained either to *Natural* or *Civil poſſeſſion*; for the Law cannot puniſh a Man for not *apprehending poſſeſſion*, who could not *apprehend it*; and for the ſame reaſon, if the time of *Entrie* was not come, he who is *infeft* by a *baſe infeftment*, will be preferred in that caſe, as if he were in poſſeſſion; and the reaſon of all this is, becauſe Our Law conſidering, that *baſe infeftments* were *clandeſtinely* made, betwixt *confident* and *conjunct perſons*,

ſons, to the ruine of *lawful Creditors*, who could not know the ſame, there being then no *Regiſter of Seaſins*; it therefore declared all *baſe infeftments* to be ſimulat, which were not cloathed with poſſeſſion; and *therefore before the terme*, at which he who got the *baſe infeftment* could enter to the poſſeſſion, there could be no *Simulation*, nor *fraude* in no party; And in this the *Law* conſiders much the intereſt *of lawfull Creditors*. by ſuſtaining that kind of poſſeſſion in their *favours*; which would not be ſuſtained in *favours of near Relations*; or where there is no *Onerous cauſe*; and thus a *baſe infeftment* given be a *Father* to his own *Son*, will not be cloathed with poſſeſſion, by the reſervation of the Fathers *liferent* though the *reſervation* of the *Fathers* Book 2. Tit 7.

Book 2. Tit. 7. *thers liferent* would cloath a *base infeftment* granted by him to a *lawful Creditor*; and the *Husbands possession* is accounted the *Wifes possession*, in so far as concerns her *principal Joynture*; but not in so far as concerns her *additional Joynture*; in a *Competition* betwixt her and her *Husbands lawful Creditors*.

There is another possession also called *Per Constitutum*, which is when a man who gets a Wadset, sets back the Wadset lands, to the Disponer for payment of a Tack duty, called *The back Tack duty*: and the Wadsetter receiving payment of that *back Tack duty*, is said to possess the Wadset Lands *per Constitutum*.

Sometimes likewise, for the more security a *base infeftment*, which is given to be holden of the *Disponer*, will be confirmed by

Book 2. Tit. 7.

Confirmation.

by the *Superiour*; but that *Confirmation* does not make it a *publick infeftment*; for no *infeftment* can be called a publick *infeftment*; but that which is to be holden of the *Superiour*; but the uſe of that *Confirmation* is, that after the *Superiour* has confirmed voluntarly the *ſub-Vaſſals Right*, he thereby acknowledges his Right; and conſequently, can ſeek no *Caſuality*, which ariſes upon want of the *Superiours conſent*, (ſuch as *Forfeiture*, or *Recognition*; But becauſe the *Diſponer* is ſtill *Vaſſal*, therefore his *Superiour* will ſtill have right to the *Rents of the Lands*, by his *liferent Eſcheate*, and to *Wards*, and *None-entries* by his death; but if the *Superiour* enter the *ſub-Vaſſal* onely upon a Charge, (this being no *voluntar act* of his,) that does not cut him off from thoſe *Caſualities*. Some-

Book 2. Tit. 7.

Sometimes likewiſe, the *Seller* reſigns the Lands in *favours* of the *Superiour*, if the lands be ſold to the *Superiour himſelf*, which is called *Reſignatio ad Remanentiam*; becauſe the Lands are reſigned to remain with the *Superiour*, and in that caſe, the *property* is ſaid to be *Conſolidated* with the *Superiority*, that is to ſay, the *Superiour returns to have all the right both of Property, and Superiority*; nor needs he be *infeft of new*; becauſe, (as we *formerly* obſerved) the *Superiour* ſtands ſtill *infeft* aſwell as the *Vaſſal*; but the *Inſtrument of Reſignation* muſt be Regiſtrated in this caſe, as *Seaſins* are in other cales, to put Men *in mala fide* to buy *.

Reſignatio ad remanentiam.

*K. C. 2 Par. 2. Seſ. 1. Act 3.

The other *Reſignation*, is called *Reſignatio in favorem*, which is when the Seller having

Reſignatio in favorem.

ing ſold his *Feu* to a third *party*, reſigns the *Feu* in the *Superiours hands*, for new *Infeftment* to be given by the *Superiour* to that third *party*. Book 2. Tit. 7.

The *warrand* of both theſe *Reſignations* is a *Procuratorie* granted by the *Seller*, to a *blank Perſon*, (and this *warrand* is ordinarly inſerted in the *diſpoſition*) impowering him to *reſign the Feu in the Superiours hands*; and this is called a *Procuratory of Reſignation*; and the *Symbols of the Reſignation* are an *Staff* and *Baſton*; and accordingly, the *Procurator* compears before the *Superiour*, and upon his *Knee*, holding a *Staff* or *Pen* at the one end, which the *Superiour* or any having power from him, holds by the other, whereby he *reſigns the Feu*, either *ad remanentiam*, or *in favorem*, as ſaid is, where Procuratory of Reſignation.

Book 2. Tit. 7. whereupon an *instrument* is taken by the person in whose favours the *Resignation* is made, which is called the *Instrument of Resignation*; and thereafter the Person in whose favours the *Resignation* is made, (if he be not the *Superiour*) is infeft, and his *Seasin* must be *Registrated* within 60 dayes, as said is.

Instr: of Resig.

The *Resignation* does not perfectly *denude* the *Seller*, untill *Infeftment* be taken upon it; and therefore the *first Infeftment*, upon a *second Resignation* will be *preferred* to him, who has but the *second infeftment* upon the *first resignation*; but yet the Lands will be in *Non-entry* in the *Superiours* hand, after the *resignation* is made, untill the person in whose favours it was made be *infeft*, for otherwayes the *Superiour* would want a *Vas-*

sal

ſal, ſince he could not call him *Vaſſal*, from whom he had accepted of a *reſignation*; nor is the Perſon in whoſe favours the *reſignation* is made, his *Vaſſal*; ſince he is not yet *infeft*; but yet the *Buyer* has a *perſonal action*, againſt the *Superiour*, to force him to *denude* himſelf in his favours; ſince he has accepted the *reſignation*; and he will likewiſe have an *action of damnage* and *intereſt* againſt the *Superiour*; if he accept a *ſecond Reſignation*, whereby a *prior infeftment* may be taken to his *prejudice*, and untill *infeftment* be taken, the *Superiour* gets all his *Caſualities*, as *Ward*, *Marriage*, *Liferent Eſcheat*, *&c.* not by him in whoſe favours *reſignation* is made; but by him who *reſigns*, ſince he remains ſtill *Vaſſal* till the other be infeft *quoad* the *Superiours caſualities*. Book 2. Tit. 7.

Title

TITLE VIII.

Of Redeemable Rights.

ANother conſiderable *Diviſion of Heretable Rights* with us, is that ſome are *Redeemable*, and ſome *Irredeemable*.

Re-deem-able Rights.

**Redeemable Rights, are theſe which return to the Diſponer, upon payment of the ſum, for which theſe Rights are granted*; and are ſo called; becauſe they may be *redeemed* by the *Diſponer*; and they are either *Wadſets*, *Infeftments*, *of annualrent* or *Infeftments for Relief*.

Wadſet

A *Wadſet*, *is a Right whereby Lands are impignorated or pleaded for ſecurity of a ſpecial Sum*, which paſſes by *Infeftment* (like other real Rights) in the terms of

of *alienation* or *diſpoſition*; and the *Diſponer* does ſecure himſelf by getting a *Reverſion* from the *Buyer*, wherein he grants and declares *the Lands redeemable from him, upon payment of the ſum then delivered, and of the annualrent thereof, which is pactum de retrovendendo*; and expreſſes the place and time when and where it is to be *delivered*, and in whoſe hands it is to be conſigned; in caſe the receiver of the *Wadſet*, refuſe to accept his Money. Reverſions may be either granted by a Paper a part, or they may be contained in the body of the Right, and are then ſaid to be *incorperated in gremio juris.*

Book 2. Tit. 8

Reverſion.

Theſe *Reverſions*, being againſt the *nature of property*, and depending upon the meer agreement of Parties, are to be moſt ſtrictly obſerved; and

are

Book 2. Tit. 8. are *strictissimi juris*; so that they are not extended to *Heirs* or *Voluntarie Assigneys*; except they be *expreſt*. But yet they may be Appryſed, which is allowed for the good of Comerce, tho a compryſer be in effect an *Judicial Assigney*, *Reverſions* muſt be fulfilled in the very terms; and it is not enough that they be fulfilled in *equipollent terms*: But after an order of *Redemption* is uſed; that is, after the Granter of the *Wadſet has duely premoniſhed the Wadſetter*, and conſigned the ſums due by the *Wadſetter*, it may be aſſigned; and though the Reverſion bears that premonition be made at the *Pariſh Church*, it will be ſuſtained if it be made perſonally to the *Wadſetter*, for that is a lurer *certioration*.

Re-

Reversions, albeit of their own nature they are *personal*, *binding* only the Granter and his *Heirs*, yet they are *real rights by our Statutes*, and affect singular * *Successours*. Book 2. Tit. 8. *K. J. 6 Par. 5. Act 28

All *Reversions*, (Except they be incorporated as said is,) and all Bands to make *Reversions*, or *Eikes* to *Reversions*, must be registrated within 60. dayes in the same Register with *seasins*; for else a *singular successour* is not oblidged to regard them *; so that if any buy the Land *irredeemably*, and *compleat* his *right*, before *Registration* of it, tho after *infeftment* upon the *Wadset* he will be preferred; but they are still valid against the *Disponer* and his *Heirs* without *registration*. *K. J. 6 Par. 22. Act 16

When the Granter of the *Wadset*, is to use an *Order of redemption*, he must premonish the Order of Redemption.

Book 2: Tit. 8: the *Wadſetter* to compear, (and take *inſtruments* thereupon, called, an *inſtrument of premonition*) to receive payment of the ſumes due to him; and at the time and place appointed by the *Reverſion*, offer being made of the Money; if the *Wadſetter* refuſes voluntarly to renounce, and to accept his Money, it is conſigned in the hands of the perſon deſigned in the *reverſion*, or if no perſon be deſigned, it may be conſigned in any *reſponſal Mans hand*; but there muſt be a *paper* taken under the *Conſignatars hand*, acknowledging that it was conſigned in his hand; for though an *inſtrument* under a *Notars hand*, proves that all this order of *redemption* was uſed; yet it will not prove the *recept* of a ſum againſt the *Conſignatar*.

If

If the *Wadſetter* receive his Money, and *renounce voluntarly*, this is called, a *voluntar redemption*; But, becauſe though *renounciations* be ſufficient to extinguiſh a Wadſet, (if no infeftment followed) whither the Wadſet was to be holden of the Granter or Superior, or to extinguiſh it, *quoad* the Granter and his Heirs, tho Infeftment followed; yet if the *Wadſet* was given to be holden of the *Diſponer*; the *Wadſetter* muſt reſign *ad remanentiam*, in the *Diſponers* hands as his *ſuperiour*; and thereafter the *Diſponer* needs not to be infeft of new; as no *ſuperiour* needs; but if the *Wadſet* be given to be holden of the *ſuperiour*; then the *Diſponer* uſes to take a *Letter of Regreſs*, whereby the *ſuperiour obliges him to receive back his Vaſſal, when*

Book 2. Tit 8.

voluntar Redemption

Letters of Regreſs.

Book 2. Tit. 8.

he ſhall redeem his own lands; for otherwayes after the *Wadſetter* is ſeaſed, the *ſuperiour* is not obliged to receive him back. But the Lands being redeemed the *ſuperiour* may be charged to infeft him, which is neceſſary for Reeſtabliſhing the right in his Perſon.

Declarator of Redemption.

If the *Wadſetter* refuſes to renounce after the Order is uſed, the Lords will *force him to renounce, and declare the Lands redeemed*, by a Proceſs, called *a Declarator of Redemption*, after obtaining of which *Decreet*, the lands are redeemed, & belong to the redeemer, and the *Wadſetter* will upon a *ſimple charge* of *Horning* force the *Conſignatar* to deliver him up the money.

The uſer of the *Order of Redemption*, may paſs from it at any time before *Declarator*; and therefore the ſumes for which

which the *Wadſet* was granted, are ſtill Heritable before Declarator; but after that they are moveable, and fall to *Executors*, except the *Declarator* be obtained after the *Wadſetters death*, in which caſe they remain Heritable; And though the *Wadſetter* require his Money, he may paſs from his Requiſition, either directly by a clear *Declaration* that he paſſes from it, or indirectly by intrometting with the *duties of the Wadſet lands*, or by taking *annualrent for terms ſubſequent to the requiſition.* Book 1. Tit. 8.

Wadſets proper and Improper.

Wadſets are either *proper*, or *Improper.*

Proper Wadſets are theſe, *wherein the Wadſetter takes his hazard of the rents of the land for the ſatisfaction of his annualrent; and payes himſelf all publicks burdens.* Improper Wadſets are

Book 2. Tit. 8. *theſe, wherein the Granter of the Wadſet payes the publick burdens*, and the receiver is at no hazard, but has his *annualrent ſecure*. And if a *Wadſet* be taken, ſo, that the *Wadſetter* is to have more than his *annualrent*; and yet the *Granter* is to pay the *publick burdens*, and free him of all hazards: This is accounted *Uſury* by *Our Law*;

Uſury the puniſhment whereof is *confiſcation of moveables, loſeing of the principal ſum, and annulling the uſurarie, contract, or paction* *; and by a late Statute, *If the Debitor even in a proper Wadſet offers ſecurity for the Money, and craves poſſeſſion, the Wadſetter muſt either quit his poſſeſſion, or reſtrict himſelf to his annualrent* *; or if it be an *Improper Wadſet* the *Wadſetter* muſt impute the *Superplus*, more than payes his *annualrent in ſortem*. And if a Man

*K. J 6 Par. 14. Act 222

Par. 15. Act 247

*K. C. 2 par. 1. Act 62

Man *impignorat* his Lands, or Bands, with expreſſe condition, that *if the Money be not payed at a preciſe day, they ſhall not be thereafter redeemable*: The *Law* reprobates this unjuſt advantage, called, *pactum legis commiſſoriæ, in pignoribus*; and will allow the Money to be offered at the Barr; or they will allow a ſhort time before Extracting of the *Decreet* for payment of it. Book 2. Tit. 8. Pactum legis. commiſſoriæ,

Taking of *annualrent* having been diſcharged by the *Cannon Law*, men did buy *annualrents* out of other *mens lands*, which was *the origin of our preſent infeftments of annualrent*, and *continues ſtill frequent*; by which if men reſolve not to reſt on the *perſonal ſecurity of the borrower*, they take him alſo obliged to infeft them in a yearly *annualrent*, payable out of his Lands infeftment of rent.

Book 2 Tit. 8. correſpondent to the *ſum lent*; but if they exceed the *ordinar annualrent* allowed by *Law*, it will *infer uſury*; and ſo they have a *double ſecurity*, one *perſonal againſt the borrower for payment*, and an other real againſt the ground, it being *debitum fundi*; for which they may *poynd* any part of the ground; as alſo they have good action againſt the *Intrometters* with the *duties of the lands*, out of which their *annualrents* are payable; though they cannot *poynd* or exact from the *tennents* any more then they owe to their *maſter* *. If the *tennents* compear and inſtruct what they were owing the time they got the *citation*, by producing the maſters diſcharges.

*K. J. 3 Par. 5. Act 36

These *annualrents* require a ſpecial *ſeaſin*, like *Wadſets*, and other real rights; the *ſymbols*

bols whereof, if the *annualrent* be payable in money, is a *penny of money*; but if it be payable in *Victual*, it is a *parcel of Victual*.

This is *singular in infeftments of annualrent*, that appryſings, thereupon will be preferred to all *prior appryſings*, *quoad* the bygones, of the *annualrent*, if the *infeftment* of *annualrent was prior* to thoſe *appryſings* to which the *appryſing* will be drawn back, and preferred to *any interveening right*, which *priviledge* is contained in the *late Act of Parliament*, concerning *Debitor* and *Creditor* *.

*K. C. 2 Par. 1. Act 62

These *infeftments of annualrent*, being *properly* granted *for ſecurity of ſums* are *extinguiſhed* not only by *reſignations*, but by *renouncia ions*; and even by *intromiſsion*, with as much as might pay the *principal ſum*,

Book 2. Tit. 8.

which *intromiſſion* is probable by *witneſſes*, whether the Rent be *victual* or *money*, and therefore *ſingular Succeſſors* buying *infeftments of annualrent*, are not ſecure by any *regiſter* but muſt reſt on the *warrandice of the Seller*.

Infeftment of relief.

Infeftments of relief, are theſe, which *are granted* by a *debitor* to his *creditor*, *for ſecurity of ſums owing to him*, upon which the *creditor* cannot enter to *poſſeſſion*, till he be *diſtreſſed*, and when the *ſum* is payed, the right becomes abſolutly null, as being but a *temporarie right*, and ſo the *debitor* who granted the *right*, needs not be *of new infeft*, but his former *right revives*.

Tit.

Title IX.

Of SERVITUDES.

THE *Nature and Constitution of Property, and real Rights, being explained in the foregoing Titles. We shall now treat briefly of Servitudes*; which are *Burdens, affecting Property* and *Rights.*

Servitudes are either *Real, or Personal.* servitudes real and personal.

Real servitudes are *whereby one mans property or ground is affected with some Burden for the use and behoof of anothers Man's ground directly* and indirectly *for the proprietars use as having right to that ground* which are divided in *Rural servitudes* and *Urbam* or *Citie servitudes.*

Rural Servitudes, are *Iter*, Rural servitudes

Book. 2. Tit. 9. which is, *a power of goeing through* our neighbours lands; *Actus*, *is a* Power *of driveing Carts, or Wains*; Via, *is the priviledge of having high wayes in our neighbours ground*; and *Aquæ ductus*, which is a *power and priviledge to draw Water alongst their ground for watering of our own*, and thus *Via*, includes *Iter*, and *Actus*, as the leſſer *ſervitudes*; ſo he that has *a Via*, has alſo power to drive carts and waines, and to walk himſelf through the Ground burdened with the *Servitude*, and of drawing ſtones and timber through the ground of the ſervient tenement.

Actus Via

City Servitudes

The *City ſervitudes*, called, *ſervitutes Urbanæ*, are chiefly five.

Oneris Ferendi

The firſt, is *Oneris ferendi*, which is *a priviledge*, *whereby one who has a houſe in the City*, *can*

can force the Proprietar who has a house below his, to bear the burden of his house; and he may force the *Owner of the servient tenement* to repair it, and make it fit for supporting the *dominant tenement*, contrary to the *common nature of servitudes*.

Tigni immittendi

Secundo, tigni immittendi, which is the priviledge of *forcing our neighbour to receive into his house the jests of ours*.

Stillicidii.

Tertio, Stillicidii, vel fluminis, which is, *whereby our neighbour is obliged to receive the drops which fall from our house*, under which, is likewise comprehended the priviledge *of carrying away our Water by sinks and Channels*.

Non Offici: Luminibus.

Quarto, Non officiendi Luminibus, whereby he can do *nothing that can prejudge our* Lights.

Quinto

Book 2. Tit. 9.

Altius non tollendi

Quinto, *Altius non tollendi*; whereby our neighbour *cannot raiſe his houſe higher*, to *prejudge* the *lights* of the *dominant Tenement*; which he may otherwiſe freely do if he be not reſtrained by this ſervitude.

By *Our Law*, *ſervitudes* may be conſtituted without any *ſeaſin*; becauſe they are *incorporeal rights*; but though a *ſervitude* meerly eſtabliſhed by *write*, be ſufficient againſt the *granter*; yet they are not *valid* againſt *ſingular Succeſſors*; except that right be cloathed with *poſſeſſion*, which compleats the *ſervitude* and makes it a *real right*; and they may be likewiſe eſtabliſhed by *preſcription* without any *write*, from him who has the *ſervient tenement*; though he who is to acquire the *ſervitude* by *preſcription*, muſt have a real right in his perſon of the Lands

Lands to which he preſcrives the ſervitude. Book 2. Tit. 9.

The *ordinary ſervitudes* ſuperadded by us, to theſe of the *Civil Law*, are the *ſervitudes* of caſting *Fail* and *Divot*, *common paſturage*, and *Multures*.

Common paſturage, *is a right of paſturing* the *Goods* and *Cattel of the dominant tenement*, *upon the ground of the ſervient*, which is conſtituted frequently by a *Charter*, containing the *clauſe of common paſturage*; and ſometimes by a *perſonal Obligement*, cloathed with *poſſeſſion*; but albeit it be *indefinite*, yet it can reach no further than to the *proportion of goods* effeiring to the rent of the *dominant tenement*, and which they may keep and fodder in Winter; which is done by Sowming and Rowming, that is to ſay, the *determining the proportion of goods belonging* Common Paſturage

Book 2. Tit. 9.

longing to each Dominant tenement, by * *assigning them particular rowms, according to their respective rents.*

Sowming and Rowming.

Common Pasturage in our Law, does ordinarly comprehend all the *lesser Servitudes*; such as the casting of *Fail* and *Divots*, *presumptively* only; for the one may be possest without the other; nor will *common Pasturage* inferr a *Servitude* of casting off *fail* and *divots*, if he who possessed the common Pasturage was interrupted as to the casting off *Fail and Divot.*

Common Pasturage.

Thirlage.

Thirlage, is, *that Servitude whereby the lands of one Heritor are to pay some duty to the Mill of another.*

Mills.

Mills, are *inter Regalia*, and require therefore a special *Sasin*; the *Symbols* whereof are *Clap* and *Happer*; but if the *Mill* be in a *Barrony transit cum universitate.*

Mills

Mills, are ordinarly disponed with *Multurs* and *Sequels*; the *Multurs* are a *quantity of Corn, payable to the Heritor of the Mill for grinding.* The *knaveship*, *lok and bannock*, are a small quantity payable to the Servants for their pains. Book 2 Title 9 Multurs

These quantities that are payed by those that are *thirled*, are called *Insucken Multurs*, and those quantities that are payed by such as come voluntarly, are called *outsucken Multure.* Insucken and Outsucken-Multurs

Thirlages, are constituted by *Write*, or by *Prescription.*

The wayes of constituting *Thirlage* by *Write* are these;

First, When a Master *thirles* his own *Tennents*, to his own *Mill*; in which case ordinarly he deminishes the rent of his land, in *contemplation* of what they are to pay to the *Mill*, for grinding their *Corns*, which he does

Book 2. Tit. 9.

does by an Act of his own Court.

Secundo, When an Heritor ſells his lands, to be holden of himſelf, and *thirles* his *Vaſſal* to his *Mill*; in which caſe he ſells ſo much the cheaper, and ſo the *Multurs* are juſt.

Tertio, When the Heritor of a *Mill*, *diſpons his Mill*, with the *Multurs* of his own Lands, in which caſe the *Multurs* are alſo juſt; becauſe he gets ſo much the more for his Mill; and ſo this Servitude is not ſo odious as it is believed to be.

Quarto, If a man diſpons the Mill of a Barrony, *cum multuris* or *cum aſtrictis multuris*; in either of theſe caſes he thereby aſtricts his whole *Barrony*; though not formerly aſtricted, but if he diſpone the Mill of the Barrony, *cum multuris ſolitis & conſuetis*; he is thereby under

underſtood to have *thirled* only what was formerly *thirled.* Book 2. Tit. 9.

If the *thirlage* bears *omnia grana creſcentia*, all the *Corn* growing upon the Land will be *thirled*, with *deduction* only of *ſeed*, and *Horſe corn*, and the *ferme*; except it be carried to another Mill, for it is preſumed *fermes* muſt be ſold.

Quinto, When *invecta & illata* are *thirled*, all *Corns* which thole Fire and Water within the *aſtriction*, muſt pay *multur*; though they come not to the Mill; and tholing Fire and Water in this aſtriction, is ſo interpreted as to extend only to *Corns that are ſteeped and kil'd.*

The way of conſtituting *thirlage* by *preſcription*, is *immemorial*, or 40. *years poſſeſſion*, by vertue of ſome *title*; ſuch as a *Decreet*, though in abſence; and even when the *Maſter* is not

Book 2. Tit. 9. not called; and any Act of a *Barron court*, though made only by a *Baillie*, without a special warrand from the *Heritor*; is a sufficient Title for *prescription*; and though the coming to a *Mill*, *past all memorie*, does not astrict the Comers for the future; it being a general rule in all *servitudes*, that, *ea quæ sunt meræ facultatis non præscribuntur*; yet in *mills* of the *Kings property*, *immemorial possession*, constitutes a *thirlage*; and if Men likewise pay *dry multurs*, that is to say, such a quantity, *whether they come to grind or not*, for 40. years; they will be thereby astricted; for it is not presumable they would have payed *dry multure*, for so long a time, except they had been *thirled*.

Dry Multurs

If the quantity to be payed, be not determined in *Write*, it

it is regulated by the use of payment for 40. years. Book 2 Tit. 9.

Those who are *thirled*, are also obliged to maintain the *Mill*, *Mill dammes*, *Water gangs*, and to bring home its *Millstones*.

If such as are *thirled*, bring not their *Corns*, they are persued by an action called, *abstracted multurs*.

There are two Rules to be observed in all *servitudes*.

Primo, *Res sua nemini servit*, no man can have a *servitude* on what is his own; and therefore if the Land on which we have a *servitude* become ours, the *servitude* is *extinguished*.

Secundo, When we have a *servitude* on any other land, this *servitude* affects every foot of that land, *unaquæqua gleba servit*; but this is to be taken *civiliter*

Book 2. Tit. 9. *civiliter, & non judaice*; so that it must be reasonably used; And thus, if we *Feu* out some *Acres*, with priviledge to the *Feuer* to cast *Faill* and *Divot* upon our Moor, for maintaining his houses; though in strict Law, every part of the Moor is affected with the *servitude*; yet the *Lords* will allow any man to Till and Sow his own Moor, leaving such a *proportion*, as may maintain these houses.

Personal servitudes. *Personal Servitudes*, are *whereby one mans property, is affected with some burden tending directly to the* Utility, and profite of another Man: And by the *Civil Law* are divided in *usu fruct: use*, and *habitation*.

Usus fructus is called, *liferent in Our Law*; which is a *right to use and dispose upon any thing during life, the substance there-*

of

of being preſerved.

Uſe and *habitation* were reſtr ɛted to the *naked uſe of the Liferenter*; whereby his power of *diſpoſing* and making *profit of* the thing *liferented* was reſtrained; and are not in uſe with us.

Life-Rents and their Diviſion.

Liferents are either conſtituted by *paction*; or by Law; *liferents* by *paction*, are either by *Reſervation*; as when a *Fiar denuds himſelf* of the *Fie* in *favours* of another, *reſerving* his own liferent; or by a new conſtitution; as when the *Fiar* diſpons his lands to another, during all the dayes of his life; the firſt needs no infeftment; but the ſecond does; elſe it is not *valid* againſt *ſingular Succeſſors*; but the *liferenter* being *infeft*, *tranſmits* his *right* to any by *aſſignation* without *infeftment*? for it being a *ſervitude* and

Book 2. Tit. 9. and *personal right*, it neither needs nor can admit of a *subaltern infeftment.*

A *Liferenter* also by Reservation, may enter the Heirs of Vassals (though he cannot receive *singular Successours*) if he was himself infeft; but another *Liferenter* cannot; and even a *Liferenter* by *reservation* cannot enter those *Vassals*, if he was not once infeft, because he cannot transmit a right which he has not.

When moe persons are joyntly infeft, they are called *conjunct Fiars*; but though a Wife be a *conjunct Fiar*, yet her *Fie* lasts but during her *Life*; and during her *life*, she may enter *Vassals*, and has right also to all the *casualities*, as other *Fiars.*

Conjunct Fiars.

Life-Rents by Law

Liferents by Law, are the *Terce* and the *Courtesie.*

The

The *Terce* is a *Liferent* of the *third of all the tenements, wherein the Husband dyed infeft, provided by law to a Wife*; which is explained before *title Marriage*; which Terce is constituted by an Inqueſt, who upon a Brief out of the *Chancellary*, directed to the *Sherriff*, or other *Judge ordinary*, do ſerve her to a *Terce*; upon which ſervice, the Judge to whom the *Brief* was directed without *retouring* it, divides the *land* betwixt the *heir and relict*, & expreſſes the *marches* in an *inſtrument*, and this is called to *kenne her to her Terce*; the *marches* being *kenned* by the *inſtrument*; and though the *ſervice* gives her right to the third of the *meals* and *duties*; yet ſhe cannot remove *tennents*, thereby, till ſhe be *kenned to her Terce*, or the ſame otherwiſe divided; Becauſe before diviſion, ſhe bruiketh Book 2. Tit. 9.

Book 2 Tit. 9. bruiketh the *Terce pro indiviſo*, with the Proprietar.

This *Brieve* contains two points; firſt, that the *bearer*, was *Lawful Wife* to the defunct; and *ſecundo* that he dyed *infeft* in ſuch *tenements*, but if the *Relict* was holden and reputed *Lawful Wife*, in her *Husbands life*; no exception in the contrary will ſtop the ſervice *.

Brieves.

*K. J. 4 Par. 6. Act 77.

There is no *Terce* in *Burgage Lands*, *Fen duties*, or other *caſualities*, of the Superiority, nor in *Reverſions*, *Tacks*, nor *Patronages*.

The *Courtiſie*, is a *liferent*, granted by *Law*, *to him who married ane Heretrix*, *of all her Heritage*, *and of that only*; It needs neither *ſeaſin*, nor other *ſolemnity* to its *conſtitution*; but is *ipſo jure*, continued to him; if there were Children *procrea-*

Courteſie.

ted

ted of the *Marriage*, who were heard *to cry*; though the *Marriage diſſolve* within *Year* and *Day*. Book 2. Tit 9.

All theſe *Liferenters* are obliged to find *caution* to preſerve the thing *liferented*, and to leave it in as *good condition* as they found it, which is called *cautio uſufructuaria*; and they are alſo bound to *Aliment* the *appearand Heir* if he have not *Aliundi*, to *Aliement* himſelf *. Cautio uſufructuaria. *K.J.4. par: 3: Act 25.

The Legall terms of all *Liferents*, are *Whiteſunday* and *Martinmaſs*; And therefore if a *Liferenter* ſurvive *Whiteſunday*, or dye upon the *Whiteſunday*, in the Afternoon; Her *Executors* have right to the half of the *Liferent* duties for that year, whether they be payable in *Victuall* or *Monies*; And if ſhe ſurvive *Martinmaſs*, or die

Book 2. Tit. 10. upon *Martinmaſs* day, in the afternoon; her *Executors* have Right to the Liferent duties of that whole year, and that, whether it be *Land-rent*, or the *rent of a mill* albeit the *Conventional terms* were after *Martinmaſs*; But if *Liferenters* labour the Lands themſelves, their *Executors* will have right to the whole rent thereof, at whatever time their death happen.

TITLE X.

Of TEYNDS.

Teynds

Teynds, being a *Burden affecting Lands*, fall in to be conſidered in this place.

Teynds are deſyned to be that

that *ſpecial and liquid proportion, or quota of our Goods, and Rents lawfully acquired that is due to GOD, for maintaining His Service.* Book 2. Tit. 10.

It ſeems *Our Law* has followed the opinion of thoſe *Divines*, who think, that ſome *proportion* of our Goods is due by *Divine right*; for we ſay, that *Teynds are the ſpirituality of the Churches revenue*; But that the proportion is not *Juris Divini*; for we alter the proportion by ſpecial *Laws* and *cuſtoms*; though for diſtinctions ſake we call this *proportion* the *Tenth.*

By the *Canon Law*, they are divided into * *perſonal Teynds*, which *ariſe out of the perſonal gain and profites, that a Man has by his Trade, or perſonal Induſtrie*; *Predial Teynds, which ariſe from the Natural Product of the Land that* Perſonal Teynds. * Predial Teynds

Book 2. Tit. 10.

men poſſeſs. And mixt Teynds which ariſe from the profites, that men by their Perſonal induſtry make out of their Lands.

Parſonage & Vicarage teynds

They are likewiſe divided into *Parſonage teynds*, which are *due to the Parſon*; and *Vicarage teynds*, which *are due to the Vicars*; And regularly all *teynds are due to the Incumbent*, who ſerves the *Cure*; ſo that if the *Incumbent* be a *Parſon*, he has a right to the *Parſonage teynds*; and if he be a *Vicar*, he has right to the *Vicarage teynds*.

The *teynds of Corn*, are called *Parſonage teynds*, or *decimæ garbales*; and the *fifth boll* of the *free rent* is ſtill *teynd* with us; And all Land muſt pay *teynd*; except they be ſuch as have been *Feued* out of old by *Church men*, before the *Lateran Council*, (by which they were prohibited to *alienat* the *teynds*) and

and who had right both to *ſtock* and *teynd*; and where the *teynds* were never *known to have been ſeparated from the ſtock*. Book 2. Tit. 10.

Some *Monks* likewiſe got particular *exemptions* from paying *teynds*, for theſe Lands which they themſelves did bring in, and *cultivate*; and with us the priviledge granted to *Temple Lands*, which belonged of old to the *Knights of St. John, a Religious Order*; and to the *Monks* of the *Ciſtertian Order*, are continued to thoſe who have right to their Lands, with that *Exemption*: *Manſes*, and *Gleibs*, are likewiſe free from payment of *teynds*.

Vicarage teynds, are called the *ſmall teynds* with us; becauſe they are payable out of inconſiderable things, ſuch as *Lambs*, *Wool*, *Cheeſe*, *Eggs*, *&c.*

Book 2. Tit. 10. and they are ſaid to be *local*, becauſe they are payed according to the cuſtome of the place; ſo that in the ſame *Pariſhes*, ſome *Heritors*, will be lyable for *Vicarage teynds* of different kinds; for though no man can preſcrive a *liberty* from payment of *Parſonage teynds*, ſince the *Lateran Council*; yet, as 40. *years poſſeſſion* is a ſufficient right to a *Miniſter*, for *Vicarage teynds*; and as it does determine the *Quota*, as well as the *ſpecies of Vicarage teynds*; ſo by 40. *years Freedome*, the *Heritour* is ſecure in all time coming, from payment of *Vicarage teynds*.

When *Popery* was ſuppreſt, all the Lands belonging to *Monks* and others, were *annexed* to the *Crown*, in *Anno* 1587*; but the *Teynds* belonging to them were not annexed; theſe being

*K. J. 6 Par. 11. Act 29

being acknowledged by our Law, to be the *Patrimony of the Church*; and they are therefore called; the *Spirituality of the Benefices.* Book 2. Tit. 10

The *Monaſtries* of old having gotten ſeveral *pariſh Churches* mortified to them; whereby they had right to their *Perſonages Teynds*; ſuch as got thoſe *Monaſtries erected* in their Favours, became thereby to have right to other *mens Teynds*; and great Emulation as well as Prejudice ariſing from mens not having right to lead their own *Teynds.*

King Charles the firſt, did therefore prevail with all the ſaids *Titulars of erection*, to ſubmit what ſhould be payed them, as the price of the ſaids *Teynds*; and *His Majeſtie* did determine, *that the rate of all Teynds, ſhould be the fifth part of*

Book 2. Tit. 10. *the conſtant rent*; where the Stock and Teynd were accuſtomed to be ſet joyntly; But where the *Teynds* were ſet ſeparately from the Stock, the Heritor did in the Valuation get down a fifth part, of what was proven and valued to be the rate of the *Teynds*; and which Deduction is called the *Kings Eaſe*; becauſe it was given by him in his Decreet Arbitral: It was alſo ordained, that the ſaids *Teynds* being valued, ſhould be bought at nine years purchaſe*.

*K. C. 1 par. 1. Act 17. and 19.

K. C. 2. Par. 1. Seſſ. 1. Act 61. For effectuating this *Determination*, the *Parliament* 1633. appointed ſome of their own number, to value the ſaids *Teynds*, and after a *Proceſs for Valuation* is raiſed, before theſe Commiſſioners, in which the Titular his *Tacksman*, and the *Miniſter*; are to be cited, the

Valuation of Teynds

Heritor

Heritor in the mean time gets the leading of his own *teynds*. Book 2. Tit. 10.

The *Probation* is ofttimes allowd to both *parties* in this *court*; and where one *party* is preferred, it is called, the *prerogative of probation*; and is much contended for; and is thus regulated, *viz.* either the *teynds* are drawn *ipſa corpora*, by the *Titular*, or *Taeksman*; and then they have the *ſole probation* allowed them, to prove what the *teynds* were worth. (They proving that they led *ſeven years* of 15. before 1628;) or elſe they have *Rental bolls* payed them, *& eo caſu*, they have the *ſole probation* likeways, they proving 20. *years poſſeſſion* of uplifting *Rental bolls*, condeſcending upon *quantity* and *quality*; Or *Tertio*, the *Heritors* have Tacks of their own

Book 2. Tit. 10. *teynds*, for payment *of Silver dutie*; and then there is *joint probation* allowed both to *Heritor*, and *Titular*.

Eccleſiaſtick Perſons, ſuch as *Biſhops*, *Parſons*, *&c.* Submitted only what they were not in *poſſeſſion of*; and therefore, there can be no *valuation* led of any *teynds*, *Parſonage*, or *Vicarage* which they were *actually in poſſeſſion* of, but by a *Letter* from His *Majeſtie*; thereafter in *anno* 1634. It is declared, that *if their teynds be ſet to Tacksman, they may be valued during the tack; whereas the teynds they were in the natural poſſeſſion of cannot; though teynds holden of Collegiat Kirks may be valued; and ſo may be bought and ſold.*

The *Burrows* are only *decerned* to ſell the *Superplus*, of the *teynds*

teynds they had right to, over and above what will be due for the intertainment of their *Miniſters*, *Colledges*, *Schools*, and *Hoſpitals*. Book 2. Tit. 10.

After the *teynds* are valued, and the *Titular decerned* to ſell; or if the *Tiular* be willing to ſell without a *decreet*; The *Heritor* is *infeft*; and *ſeaſed* by the *Titular*, who in the *diſpoſition*, or *Charter* reſerves to himſelf relief of the *Kings annuitie*, and of all *impoſitionns* laid or to be laid upon *teynds*; and *warrands* only from his own, and his *Predeceſſors facts* and *deeds*; and on the other hand the *Heritor* who has got *a Decreet of valuation* only and not *of vendition*; is obliged to *infeft* the *Titular*; for *ſecuritie* of the *valued bolls*.

By the foreſaid *Decreet Arbitral*, the ſeveral *Pariſh Kirks* were

Book 2. Tit. 10. were to be provided; and therefore the *Titular* might *Allocat* any one *Heritors teynds*, for proviſion of the *Miniſter*, which renders the priviledge of baying very ineffectuall to the *Heritors*; whereas it had been much better, that the *Stipend* had been proportionably laid upon all the *Heritors*.

Burdens affecting Teynds

Teynds are not *debita fundi*; and ſo *ſingular Succeſſors* are not lyable in them; but yet the *Miniſter* has ſo far a *taeit hypotheque*, that he may exact his *modified Stipend*, from any of the *Heritors*; as far as his *teynds* will extend, reſerving *relief* to that *diſtreſſed Heritor*; and if the *Heritor* ſell his *Crop*, the *Merchant*, who *buyes* the ſame will be lyable, but *tennents* will not be lyable; if they pay a *joynt dutie* to their *Ma-*

Maſter both for *Stock* and *Teynd.* Book 2. Tit. 10.

When the *tack of teynds* expire; the *Titular* needs not uſe a *warning* againſt the *tacksman* as in *lands*; but he raiſes and executes an *Inhibition* againſt the *Tacksman*, which interrupts *tacit relocation*, for that and all the *Subſequent years*, after which the *intrometors*, are lyable to a *Spuilye.* Inhibition upon Teynds.

The *Parliament* 1633. did after the ſaid *ſubmiſſions* and *Decreet arbitral*; grant to His *Majeſtie* an *Annutie* out of all *teynds*; except thoſe payed to *Biſhops*, and other *pious uſes*; *viz. ten ſhilling out of every boll of teynd Wheat*; out of the *boll* of the beſt *teynd Bear eight ſhilling*; *out of Oats*, *Peas*, and *Rye*, *ſix ſhilling*, where the *boll of* theſe *grains* did yield a *Boll of Meal*; and where the Rent conſiſts Annuities of Teynds.

Book 2. Tit. 11. conſiſts *of money, ſix merks out of* every *hundered*; and this *Annuity* is *debitum fundi*; but not being *annext to the Crown*, it may be, and is ordinarly bought by the *Heritors*, from His *Majeſties Theaſaurer*, or others having *right from the King*.

TITLE. XI.

OF INHIBITIONS.

PRoperty, and Real Rights, with the burdens affecting the ſame, being explained: It is fit now to treate of *Legal Diligences*, by which theſe *rights may be evicted*, or the *free uſe* and *diſpoſal thereof Reſtrained*; which *diligences* are chiefly three, *Inhibition*, *Compryſing*

pryſing, and *Adjudication*. Book 2. Tit. 11.

Inhibition, is a *perſonal prohibition, by letters under the Signet, Diſcharging the partie Inhibited to ſell, Dilapidate, or put away any of his Lands, in prejudice of the debt due to the Raiſer* of the *Inhibition*; The ground and Warrand thereof is a *Decreet*, or a Regiſtrate Bond; (which in the Conſtruction of Law is a Decreet;) either *deeerning* or *obligeing* the *Debitor*, *to pay or perform*, the ſumes or deeds therein ſpecified: or a *depending Proceſs*: And if theſe *Inhibitions* be not raiſed upon *Legal* and *Relevant* grounds, they may be reduced. Inhibition. Ground thereof.

Inhibitions reach only *Heritage*, but not *moveables*; though the ſtile thereof runes equally againſt both; and *moveable bands* can only be reduced, In ſo far as they may be the Foundation of Extent thereof.

Book 2. Tit. 11. of *real diligences* to affect *Heritage* reſerving ſtill perſonal execution againſt the granter, and they extend only to *poſterior voluntary Rights granted after Inhibition*; but not to *Appryſings*; or *Adjudications*, though led poſterior to the *Inhibition*, if the ground thereof was *anterior*; neither do they extend to *poſterior diſpoſitions*, and *Infeftments* depending upon *prior obligements*; either general or particular, for granting of theſe Rights; nor to *Renounciations of Temporal Rights*; albeit *poſterior* to the *Inhibition*, theſe being neceſſar upon payment.

By a late Act of *Sederunt* *, *If the Creditor intimat by way of Inſtrument, to the Perſon having the right of Reverſion, that the Wadſetter, or Annualrenter, ſtands inhibit at his inſtance; and does produce in preſence of the Parties, and*

* Act of Sed. 19. Feb. 1680.

and Notar, the Inhibition duly Regiſtrated; The Lords *will not ſuſtain Renunciations, or Grants of Redemption; although upon true payment; unleſs there be a Declarator of Redemption obtained, to which the Inhibiter muſt be cited.* Book 2. Tit. 11.

The way of *executing Inhibitions* is, that the ſame muſt be by a *Meſſenger* againſt the perſon *Inhibited, perſonally*, or at his *dwelling place*, and at the *mercat croſs of the head Burgh of the ſhire, Stewartry*, or *Regalitys* where the *perſons inhibited* dwells *, and after *crying of three ſeveral oyeſes*, and publick reading of the Letters, the *whole Leiges are diſcharged* to purchaſe any Lands or Heritages, from the *perſon inhibited*; and the *Meſſenger* leaves or affixes a *coppy of the letters at the mercat croſs*, all which moſt be written in a paper, and ſubſcribed *by the Meſſenger* and

Manner of executing inhibitions.

* K. J. 6 Par. 15. Act 264 & 265. par. 16. Act 13.

Book 2. Tit. 12. *K.C.2 par. 3. Act 26. *K.J.6 Par. 7. Act 119

and by two *witneſſes* *; which write, is called *the execution of Inhibition*; and thereafter the *letters and execution thereof muſt be Regiſtrated* within 40 dayes, after the *execution* thereof; either in the *general Regiſter at Edinburgh*; or in the *particular Regiſter of the Juriſdiction*, where the *perſon inhibited* dwels; or the *major part of the Lands lye* *; and if any of theſe *Acts* be *omitted* the *Inhibition* is *null*, theſe being *de ſolennitatibus inſtrumenti.*

TITLE XII.

Of Compryſings and Adjudications.

THE *Fie being thus ſettled in the Vaſſal* it may be either taken from him,

him, and evicted *for his debt*, or his *crimes*; the first, is by *appryſing*, and *adjudication*, and the laſt, by *confiſcation* and *forefaulture*. Book 2. Tit. 12.

Appryſing proceeds by *letters* charging the *Debitor* to compear before a *Meſſenger*, (who is by the *Letters* made *Judge*; and *Shirriff* in that part in place of the *Sherreff of the ſhire*, whoſe office properly it is *) and to heat the *Lands ſpecified* in the *letters*, *appriſed* by an *Inqueſt* of 15. *ſworn Men*, and declared to belong to the *Creditor for payment of his debt*; but becauſe *Our Law* thought it not juſt that a Mans Lands ſhould be taken from him whilſt his *Moveables* could pay his debt; therefore, in the firſt place, the *Meſſenger* who executes the Letters muſt declare, that he *ſearched for moveables*; and becauſe he

Appryſing.

*K. J. 6 Par. 5. Act 37.

Book 2. Tit. 12. he could not find as many as *would pay the debt*; therefore he denounced the Lands to be appriſed on the *ground of the Lands*, and at the *mercat croſs* of the *Shire*, *Stewartry*, or *Regality* where the *Lands lye*, and left *coppies both on the ground*, and at the *Croſs*.

At the day appointed by the *Letters*, the *Meſſenger* who is made *Sherriff* in that part, *Fences a Court*, and the *Debitor* being called, his lands is offered to him for the *money*; and if the *money* be not ready: the *Inqueſt* finds that the *Debitors lands* ſhould belong to the *Creditor for his payment*, and this is called *a* * *Decreet of Compryſing*; and the moſt part of the *inqueſt affixes* their *ſeales thereto*; upon which the *Compryſer* gets a *Charter* paſt in *Exchequer*, and is *infeft by precepts out of the Chancellary*,

Decreet of compryſing.

lary; if the Lands hold of the *King*; and though of old, *land appryſed*, was proportioned to the *money*; yet *thereafter* whatever *land* was ſought to be *appryſed* was accordingly *appryſed*; though *far exceeding* the *ſum* in *value*, becauſe *ſeven years* was given (which was thereafter *prorogated* to *ten* *) for *Redeeming the Land by payment of the true ſum*, and this is called a * *legal reverſion*; becauſe the *Law* gives it to the *Debitor*; and if it be not *redeemed* within that time, the *land* belongs to *himſelf for ever*; but that *legal* runs not againſt *Minors* becauſe they want *Judgement* to know their *hazard*; ſo that they may *redeem* at any time before they be 25. *years compleat*; but if the *Compryſing expyre* during their *minority*; the *Compryſer* will thereafter have *right* to the whole *mails*,

Book 2. Tit. 12.

*K.C.2 Par. 1. Seſſ. 1. Act 62.

* Legal Reverſion.

Book 2. Tit. 12. *mails* and *duties*, albeit exceeding his *annualrent*; But that part of the *Act* is altered by a *poſterior ſtatute*, and the *appryſer* is *reſtricted* to his *annualrent* during the *minority of the Debitor*.

*K.C. 2 Par. 11. Seſſ. 3. Act. 10. *

If a *minor* ſucceed to a *minor* whoſe *lands* are *appryſed*, he has right to redeem, as if the *Compryſing* had been led againſt himſelf; Bnt if a *Major* ſucceed to a *Minor*, after the *Legall* is expired, he hath onely *year* and *day* to *redeem*; and if the ſeven years be unexpired in the *Minors* time, the *Major* may redeem within theſe years that are not run: And if the Rent of the Lands be not correſpondent to the *annualrent of the Money*; whoever has Right to the *Reverſion*, whether *Major* or *Minor*, muſt ſatisfie the whole *ſums* and *annualrents* reſting

ing before he can * redeem; But the *Compriſer* during the *Legal* is reſtricted to the *annualrent* of the ſums due to him; and the *ſuperplus of his Intromiſſion*, will be imputed in payment of his *Principal ſum*; and if he be payed by *Intromiſſion*, within the *Legal* of his whole *principal ſum*, bygone *annualrents*, and *expenſes*, with the *compoſition* payed to the *ſuperior*, the *compriſing* expires, *ipſo facto* *. * Book 2, Tit. 12. * K. J. 6 Par. 23. Act 6. * K. J. 6 Par. 21. Act 6.

Though the *ſuperiour* be not regularly obliged to receive a *ſingular ſucceſſour*; yet leaſt by *colluſion* betwixt the *debitor* and his *ſuperiour*, the true *creditor* ſhould be unpayed; Therefore by a ſpecial *Act of Parliament*, the *ſuperiour* is forced to receive a *Compryſer* upon payment of a full years Duty of the Land *, and he gets no more * K. J. 3 Par. 5. Act 37. K. J. 6. Par. 23. Act 6.

Book 2. Tit. 12. more from all; though many *compriſers* charge him to receive them; but if the *ſuperiour* pleaſes he may retain the Land to himſelf, he paying the Debt.

The firſt *Compriſing*, without *ſeaſin*, caryes right to all *Tacks*, *Reverſions*, and other Rights, which require no *Infeftment*; and all *poſteriour compriſings* need not *infeftment*; becauſe they carry only the Right of *Reverſion*; but yet ordinarly *ſecond Appriſers* do *infeft* themſelves, becauſe the firſt may be *null*, or become payed; or the firſt *Compriſer* may lye out from ſeeking *Meals* and *Duties*; or the ſecond *Compriſers* would remove Tennents, which none can purſue without being *Infeft*, but the *Superiour compriſing* needs no *Infeftment*.

After

Book 2. Tit: 2:

After *denounciation* of the Lands to be *appriſed*, the *Debitor* can do no voluntar deed by Diſponing, or Reſigning, (becauſe elſe he might fruſtrate the *diligence*) except he was before *denounciation* ſpecially obliged to *Diſpone* or *Reſigne*.

Preference amongſt appriſers.

In a competition amonſt *Appriſers*, the firſt *Infeftment*, or charge againſt the *Superiour* is alwayes preferred; and if the firſt *Compriſer* did diligence to be infeft, but was ſtopt by *colluſion*, as if the *Superiour* to gratifie the ſecond *Compriſer*, ſhould unjuſtly ſuſpend the firſt; albeit the ſecond *Appriſer* be firſt *infeft*, yet the firſt *appriſer* having done *diligence* by charging, the *Superiour* will be preferred to the ſecond *appriſer* firſt *infeft*.

The *Compriſer* during the

Book 2. Tit. 12. *years of the legal* is not obliged to enter to the *poſſeſſion*, but if he once enter he muſt be comptable for the *Meals* and *duties* though he leave off to *poſſeſs*; but if the meaneſt part of the ſum be unpayed after the expyring of the *Legal*, the whole *land compriſed* belongs to the *Compriſer* without conſideration of what he has *intrometted* with; to prevent which the *Debitor*, or a *Second*, or any *poſterior Compriſer*, who has *compriſed* the right of *Reverſion*, does before the *Legal* expire, require the *Compriſer*, to compear at any *day*, or *place*, to receive his *Money*, in ſo far as he is not payed by his *Intromiſſion*; and having *conſigned* the ſame accordingly at that Day, he raiſes an *Action of compt* and *Reckoning* before the *Lords of Seſſion*; and if it be found

found that he is payed by *Intromiſſion*, and the Money *conſigned*, *The Lords decern the compriſing to be payed*, *and extinct*; nor needs the *Debitor* get *new ſeaſin*; for the former Right revives; ſince the *Fie* was ſtill in his Perſon, upon condition, that he would *pay the ſum* within the *Legal*. Book 2. Tit. 12.

In this *compt* and *Reckoning*, the *compryſer* will get allowance of the *ſherriff* Fie; which is the *twentry Penny* of the *ſum* that was *compryſed* for, and of the *entry* payable to the *ſuperiour*, though the *appryſer* truely payed neither; but he will not get payment of a *factors fie* for taking up the *rent*; except he really payed it. Sherriff Fie.

All *appriſings* led ſince the 1. of *January*, 1652. within *year* and *day* of the firſt *effectual compriſing* by *infeftment*, or charge *K.C. 2 par. 1. Act 62.

Book 2. Tit. 12. charge againſt the *ſuperiour*, come in *pari paſu*, as if they were all contained in one *appriſing*. But the *poſterior appriſings* within year and day; muſt pay their proportion of the Expenſes of the *Infeftment*, and *compoſition* given to the *ſuperiour* by the firſt *appriſer*.

Becauſe *appearand Heirs* did frequently acquire Rights to expired *appriſings* againſt their *Predeceſſors*, by which they *bruicked their Eſtates*, without paying their Debt, to the ruine of *lawful creditors*; Therefore, *Our Law* did very juſtly ordain; all ſuch *Appriſings* to be *redeemed* for the *ſums truely payed* out by the *appearand Heir*; which proceeds, albeit the *appearand Heir* acquire theſe Rights in his *Predeceſſors lifetime*. But if the expired *appriſing* was acquired *gratis*, by

Act foreſaid

by the *appearand Heir*, the ſame is onely redeemable by the *Creditors*, for the ſums contained in the *appryſing*. Book 2. Tit. 12.

Becauſe the *Parliament* thought it *exhorbitant* to take the greateſt *Eſtates* for the *ſmaleſt ſums*, & to make a *Meſſenger Judge* in affairs of ſo great *importance*. Therefore in *anno* 1672. this way of *compryſing* was altered, and in place thereof the *Creditor* now gets land adjudged to him by the *Lords of the Seſſion*, proportionally to the *ſums* due to him (with a fifth part more) beſides the Compoſition due to the Superiour, and Expenſes for obtaining Infeftment; becauſe the *Creditor* is obliged to take land *for his money*; which *Adjudication* coming in place of *Compryſings* is perfected by *Charter* and *Seaſin*, as *Compryſings*; and the *Superiour* is o- Adjudication.

Book 2. Tit 12. bliged to receive the *Adjudger**, but it is redeemable only within *five years* by *Majors*.

*K.C.2 Par. 2. Seſſ. 1. Act 18. If the *Debitor* compear not to concur for compleating the *Adjudgers right*, by giving him a *progreſs*, and *tranſumpts of the evidents*, and ratifying the *Decreet of Adjudication*; then the whole lands muſt be *adjudged*, as they were formerly *appryſed*; (nor in that caſe can the Adjudication contain a fifth part more,) it being unreaſonable to *force* a Man to take *proportional land* for his *money*, and yet to be unſecured even for that *proportion*; and they are *redeemable* within *ten years*; (theſe *Adjudications* being now come in the place of *Appryſings*,) and have the ſame *priviledges* and *reſtrictions* which *compryſings* had by the *Act of Parliament*, made concerning *Debitor* and *Creditor*,

tor, in *Anno* 1661. But if the *Creditor* attain poſſeſſion upon his *compryſing*, or *Adjudication*; he can uſe no futher *execution* againſt the *Debitor*, except the Lands be *evicted* *. Book 2. Tit. 12. *K.C. 2 par. 2. Seſſ. 3. Act 19.

There are other two kinds of *Adjudication**, allowed by *Our Law*; The firſt is, when the *appearand Heir of the Debitor is charged to enter Heir*; and renounces to be *Heir*; the *creditor* having obtained a Decreet, *cognitionis cauſa*, for conſtituting the Debt, wherein the *appearand Heir* is only purſued for *Formality*; But the Decreet can have no *effect perſonally* againſt him; in which caſe, the *Hereditas jacens* will be *adjudged* to the *creditor* for payment of the Debt due by the *Defunct*; which if it be *liquid*, and inſtantly inſtructed; the *Purſuer* in the ſame Proceſs proteſting for *Adjudi-* Adjudications after the old Form.

Book 2. Tit. 12. *cation*, the ſame will be allowed to him, ſummarly without neceſſity of any other Decreet, *cognitionis cauſa.*

Legal Rever. of Adju. Theſe *Adjudications* are redeemable within *ſeven years*, at the inſtance of *con-creditors*, one after another, who have likewiſe obtained Decreets of *Adjudication*; And a *Minor* renuncing to be *Heir*, may be *reponed*, and allowed to *redeem upon payment* *. But *Majors* renouncing, have not that Priviledge directly, it being only by Act of Parliament granted to *Minors* or to *con-creditors* likewiſe adjudgers.

*K.C. 2 Par. 1. Seſſ. 1. Act 62.

And if the *Superiour* be charged to infeft the *Adjudger*, he will get a years rent for *compoſition*, as in *compryſings* *.

*K.C. 2 Par. 2. Seſſ 1. Act 18. *Adjudications* carry right to all which would have fallen to the *Heir*, as all Heritable Rights

Rights, and the whole bygone Rents and Duties, ſince the Defuncts death may be *adjudged*; becauſe theſe belonged to the *Heir*. Book 2. Tit. 12.

There is another kind of *Adjudication* competent by Our Law; that is for performing any obligement which conſiſts *in facto*, and relates to particular *Diſpoſitions*; and *obligements* to *infeft* and after *diligence* uſed by *Decreet*, and *regiſtrated Horning* againſt the Diſponer and his Heir, and for making the ſame effectual: the Lords will *adjudge the lands diſponed to belong to the Purſuer as a Remedium extraordinarum*, there being no other Remedy competent.

This *Adjudication* extends no farther than to the thing diſponed: and hath no *reverſion*.

If the common *Debitor* become *Bankrupt*, and that there

Book 2. Tit. 12. is real Diligences affecting his Eſtate, then the Criditors may raiſe an *Action of ſale before the Lords*, and get the Eſtate roup-
*K C.2 Par. 3. Act 17. ed *, and divided amongſt them, effeiring to their Diligences and Summs.

In this proceſs the Lords firſt Determine what ſhall be the loweſt price, and then they name one of their number, before whom the *Roup* is to be made, and if none offer more, the Raiſer of the Action is preferred, and the *Lands* are diſponed by that *Lord*, and the diſpoſition runs in his Name.

Confiſcation *Confiſcation* will be handled in the *Title of Crymes*.

THE

THE THIRD BOOK.

TITLE I.

Of Obligations, and Contracts in general.

HAving thus cleared *Real Rights*; We will now proceed to treate of *Obligations*, and *Perſonal Rights.*

Obligations.

An *Obligation*, *is defined to be that Legal tye; whereby we are bound to Pay, or Perform any thing.*

The chief *diviſion* of *Obligations* by the *Civil Law*, and *Ours*, is, that ſome are *Natural*; becauſe they ariſe from the

on of Oblig:

Book 3. Tit. 1. the principles of *right Reaſon*, or *Laws of Nature*. Some *Civil*, becauſe they ariſe from *poſitive Laws*, or *Municipal cuſtoms*.

Another Diviſion of Oblig: Another conſiderable *diviſion* of *Obligations* is, that ſome ariſe from *contracts*; ſome from *deeds*, reſembling *contracts*; ſome from *maleſices*, and ſome from *deeds* which reſemble *maleſices*, *Ex contractu, aut quaſi contractu*; *ex maleficio, aut quaſi maleficio*; for we become equally tyed and obliged to *Men*; either by *contracting expreſly* with them; or by doing ſome deed which induces an *Obligation* without an *expreſſe paction*; or by committing *maleſices* againſt them.

Contracts. A * *Contract is an agreement entered into by ſeveral perſons, inducing an obligation by its own Nature; and the obligations aryſing*

riſing from contracts, are divided and diſtinguiſhed, according as they are perfected, either by the *ſole conſent* of the *contracters*; or by the *intervention* ar *tradition* of things; or laſtly, by *Word* or *Write*; hence is that remarkable *diviſion of contracts* in the *civil Law*, *Qui re, verbis, literis, aut conſenſu perficiuntur.* Book 3. Tit. 1.

The *contracts* which depend upon things, are theſe which ariſe either from *borrowing*; (which comprehends *indebite ſolutum*,) or from *loan*; or from *depoſitation*; or from *impignoration*; and are called *mutuum commodatum, depoſitum & pignus.* Real Contracts.

* *Borrowing, or mutuum, is that contract, whereby a Man getting any thing from another, is obliged to reſtore him not the ſame thing that was borrowed, but the equivalent* Mutuum.

Book 3. Tit. 1.

valent; *or as much of the ſame quality in meaſure, number*, and *weight*; as when one borrowes a *thouſand pounds*, the *Receiver* obliges himſelf to reſtore not the ſame, but another *thouſand pounds*; and therefore the *property of the thing borrowed*, being transferred from the *Giver* to the *Receiver*; the *Receiver* runs the hazard of all the loſſe that the thing Borrowed can ſuſtain, after it is delivered: This contract is moſt ſtrictly interpreted, ſo that nothing is underſtood but what is clearly expreſt.

* Commodatum.

* *Loan, or commodatum*, is that *contract* whereby a man *gets the Loan of any particular thing Gratis, for ſome ſpecial uſe and obliges him to reſtore the ſame thing in ſpecie; and not the equivalent*; as when a man gets the *Loan* of a *Horſe*, or *coach*; and becauſe

becauſe in this caſe, the *property* remains with the *lender*, therefore if the thing lent be loſt, or periſh by Chance, the loſſe redounds to the *lender*; for the thing is ſtill his; but if the thing be lent meerly for the advantage of the *borrower*, he is lyable to do moſt exact diligence; and therefore, if the thing periſh, or ſuſtain any prejudice for want of exact diligence the *borrower* muſt make up the ſame; but if the thing was lent for both the *borrower* and the *lenders advantage*, then from the ſame principal *of natural equity*, the *borrower* is only obliged to do ſuch diligence, and to be ſo carefull of the thing *borrowed* as he would have been of his own. Book 3: Tit: 1:

In this *contract*, the *Receiver* is obliged to reſtore the ſame

ſpecies

Book 3. Tit: 1: *ſpecies* in as good condition as he got it; and the *Lender* is obliged to pay the *Receiver* any conſiderable expenſe, that he neceſſarly beſtowed upon the thing *borrowed*, the *Law* not allowing *inconſiderable expenſes*; becauſe, the *borrower* has the uſe of the thing, which ſhould compenſe theſe.

Precarium. *Precarium, is, when any thing is lent to be called back at the Lenders pleaſures, wherein it differs from commodatum*; which *imports* alwayes a *determinate time* for making uſe of the thing lent.

Depoſitation * *Depoſitation*, is that *contract* which is entered into by one mans *delivering any thing, into the cuſtody of another to be kept gratis for his uſe*; and therefore, becauſe in this *contract*, the *property remains* with him, who did *depoſitate the thing*, if it be loſt,

loſt, it is loſt to him, and ſince *depoſitations* are made for the *behoof of him* who does *depoſitate* Therefore, the *Depoſitar* (for ſo we call him, in whoſe hand the thing is *Depoſitated*) is only lyable if the *thing Depoſitat*, was loſt by the *depoſitars* dole, or *groſs fault*; *nam depoſitarius tantum preſtat dolum, & latam culpam*; But *Inns-keepers*, *Stablers*, and *Maſters of Ships*, are lyable to moſt exact diligence: in *preſerving the goods of Travellers* and *Paſſengers*, which they bring into their Houſes, and Ships, and to repair and make up all the loſs they may ſuſtain, while they are in the *Inns*, or *Ships*, whether the prejudice come by the *Servants*, or *Mariners*, or by *Strangers*, which ſpecial kind of *depoſitation*, is *introduced by equity*, *contrare* to the *Common Rules*

Book 3. Tit: 1:

Nautæ eaupones Stab: &c.

Book 3: Tit: 1: *Rules* of *Depoſitation*, and which we have immediately from the *Civil Law*, and *edictum prætoris*, Intituled, *Nautæ caupones Stabularii*, &c.

As in this *contract*, the *Depoſitar* is lyable to reſtore the ſame thing that is *Depoſitate*, and not the *equivalent*; ſo he who *Depoſitats* is obliged to pay the *Depoſitar* what he beſtowed upon it, whilſt it did lye beſide him, for generally a *Gratuitous Office*, ought to prejudge no man. But he cannot crave *compenſation* upon any debt due to him by the perſon who *Depoſitats*, which is *ſingular in this contract*, for he muſt firſt anſwer his truſt.

Pledge *Pledge*, is the *contract* whereby *one man gives to another any thing, for the Recivers Security of what he owes him, to be redelivered* upon *payment*; and there-

fore, becauſe the thing it ſelf *in ſpecie*, is to be redelivered; if it periſh during the *impignoration*, withont the groſs fault or fraud of him who recieves the *pledge*, it periſhes to the *Impignorator*; and becauſe *Impignorations* are made for the advantage of the Giver and Receiver, (the one being concerned to get Money, or ſome ſuch thing upon the Pledge, and the other to get a Pledge for ſecurity of his Money;) therefore he who receives the Pledge, is lyable to do ſuch Diligence for preſerving thereof as prudent Men uſe to do in their own Affairs; but he is not lyable for *culpa leviſſima*; the Contract being for the behoof of both Parties; and he will have *repetition* from him; for what he profitably beſtowed upon it during the *impignoration*. Book 3. Tit: 1.

Some-

Book 3. Tit: 1.

Hypotheque:

Sometimes what is impignorated is not delivered, and then the pledge is called an *Hypotheque*, and the Law sometimes makes such *tacit Hypotheques* without *express paction*, as where it makes the Corn growing upon land, or the Goods brought in to the House, to be lyable to the *Heritor* for payment of his Rent.

condictio indebiti

If one Man payes to another more than is due to him; or what is not due at all, the Law allowes to him *Repetition* of what was unjustly payed; and this is called (*condictio indebiti*;) because by *paying* to you, I oblige you *really* and *in effect*, to repay what shall be found not to be *due*; or to have been *payed* more than was *really due*; but since this Obligation arises from the Payers ignorance, therefore if he knew that what he

he payed was *due*, he will not get *Repetition*; but what he payed will be lookt upon, as a *donation*, but it muſt be *ignorantia facti*, for *ignorantia juris* availeth no Man; and ſince this repaymcut is only allowed by the *Principles of Natural Equity*; therefore if what was payed was due in *equity*, though it was not due by *poſitive Law*, the Payer will not get *Repetition*. Book 3: Tit: 2:

TITLE. II.

Of Obligations by Word, or Write.

SOme *Obligations*, require *Write*, to make them *binding*; whereas others require *Write* only by way of *Probation*, that is to ſay, Obligation by Write.

cannot

Book 3. Tit: 2:

be proven without write, though they be valid, and binding without it.

All *Obligations* for *transmitting the real right of lands*, or others to be perfected by write, do so far require *Write* of their own Nature; that though the bargan be solemnly and clearly ended, by *Verbal Transaction*; yet there is still place to *resile*, or *locus penitentiæ*, till the *write be signed.*

Promises.

Though *verbal Promises* doe by *Our Law*, bind the *promiser*; yet because the *position* and *import* of words may be easily mistaken by the *hearers*; therefore *verbal Obligations* or *Promises* can only be proven by *Oath of partie*, and not by *witnesses*, though the sum be never so *small.*

Because, *Mens subscriptions* may be easily *counterfitted*; therefore by an *expres Statute*

with

with *Us*, no Write of Importance (which we interpret to be when it is granted for more than 100 *lib*) is valid; except it be ſigned *in preſence of two ſubſcriving witneſſes*, if the party can write; or by two *Notars*, and four *witneſſes*; if the party cannot write *; except the write be *holograph*, that is to ſay, all written with the Granters own hand; and that the *writter* and *witneſſes* be *ſpecially deſigned* *; and though the *ſubſcriving* by two *initial letters* be ſuſtained, where it is proved that the *ſubſcriver* was in uſe ſo to *ſubſcrive*; yet the *Granters* mark is not ſufficient, except the verity of the affixing that mark be referred to the *Granters Oath*. And if the ſume tho Exceeding, 100 *lib.* be reſtricted to an 100 *lib.* the obligation will be ſuſtained, though

Book 3: Tit: 2:

*K:J:6: Par: 13: Act 175

*K:C:2 par: 3: Act 5:

Book 3. Tit. 2.

though it want witneſſes.

Such is the *favour of commerce*, and ſuch *expedition* it requires, that upon its *account*, *bills of Exchange* are ſuſtained; though they be not ſigned before *witneſſes*; and *delivery of goods*, upon *bargans* are ſuſtained to be prov'd by *witneſſes*; though there be no write, there being no write uſed in ſuch caſes. And ſuch is the *favour of contracts of Marriage*; eſpecially where they are become *Notor* by the *ſubſequent Marriage*; that they are ſuſtained though there be no *witneſſes*.

Bills of Exchange

By *Our Law*, an *Obligation* in write is not Binding; except it either be *delivered*, or diſpenſe with the not delivery; by a ſpecial *clauſe* therein; *nam traditione transferuntur rerum dominia*; but *tradition* is not requiſite in *mutual contracts*, or where

delivery of writes

where the granter has an interest to keep the paper himself, as where his Liferent or Liberty to alter is reserved; and if the Write be in his hand, in whose Favours it was made, it is presumed to have been delivered, and cannot be taken from him upon the pretence of *not delivery*; except it be referred to his Oath that it was never a delivered evident by the *Granter*. Book 3. Tit. 3.

Title III.

Of Obligations, and Contracts ariseing from Consent, and Accessory Obligations.

THough all *Contracts* require the consent of the *Contracters*; yet there are four, *viz. Emption*, Contracts perfected by Consent

Book 3 Tit: 3. *Location*, *Society*, and *Mandat*; which are ſaid in a more ſpecial way to ariſe from Conſent; becauſe theſe Contracts are perfected by meer *Conſent of Parties*, without any further Solemnity, or Tradition; and thus how ſoon two Parties agree, concerning the price of any thing that is to be ſold, that *Contract* is by meer Conſent ſo far perfected, that he hath the Seller preciſly obliged to deliver the thing bought and perfect the Sale; albeit the *dominium* or property be not transferred, but remains with the Seller untill delivery; and if the thing bought periſh without the ſellers fault, even before delivery, the loſe is the buyers, in reſpect of the perſonal Oblidgement upon the Seller, to deliver it, and the *Buyers right is eſtabliſhed* even

Em. & vend.

even before *tradition*; and though *earneſt*, or *arles* be given as a *Symbole* or *mark* of *agreement*; yet the conſent without the *earneſt* or *arles* (as we call it) compleats the *bargan*; and if the *earneſt* be in *current money*, it is to be imputed as a *part of the price.* Book 3. Tit. 3: Earneſt.

In this *Contract of Emption* and *Vendition*, there muſt be a price, conſiſting in *numerat*, and down *told Meney*; for if one thing be given for another, the Law calls that Contract, *Permutation*, or *Excambion*, and not *Emption* and *Vendition*; and this price muſt be certain and definite; and if the price be referred to another, the Bargain will ſubſiſt; except that third Partie, to whom it was referred, either will not, or cannot determine the price.

Location and *Conduction*, is a

Book 3. Tit: 3. *Contract whereby a hyre is given, for the uſe and profite of any thing, or for the work of perſons.* It differeth from *Emption* and *Venditition*, chiefly in this, that the deſigne of the Contract is, to *transfer* the Poperty; but in *Location* the Property remains with the *Setter.*

Location and Conduction.

This Contract being entred into by the *mutual conſent*, and for the Advantage of both Parties; the Conductor is only lyable to uſe and adhibite a moderate Diligence, for preſerving the thing ſet; that is ſuch *diligence as prudent Men adhibite in their own affairs*; ſo that if the ſame periſh without his *groſs and ſupine negligence*, or *fraud*, he is not lyable to make it up to the *Locator.*

Tack Duty.

Location or ſetting of *Lands* for a certain hyre, (called the *Tack dutie* *,) is frequent in *Scotland*

Scotland; and it is to be obſerved that if the *Ground yeild no increaſe*, but is abſolutely *barren*, without the Fault of the *Conductor*; the hyre will not be due, ſince that was given for the *profite* and *uſe* of the ground; But if there be not an *abſolute Sterility*; and that the *Land* yeild ſome profite, though never ſo little; the hyre will be due, if the profite but exceed the expence of the *labouring*. Book 3. Tit. 3.

From this Contract there ariſe *two Actions*, the one whereby the *Conductor* is obliged to pay the hyre agreed unto, and to reſtore the thing ſet after the end of the *Location*, in as good condition as he got it. The other is an Action whereby the *Locator* is bound to refound to the *Conductor*, the neceſſary expenſes imployed upon

Book 3. Tit. 3. on the thing hyred, during the *Location*. *Vide ſupra*; *Book 2. Title 6.*

Society. *Society*, is a *Contract*, whereby ſeveral perſons oblige themſelves to *communicate loſs and gain ariſing from the things common in the Society.*

All the *Partners* in the *Society*, do by the *nature of this Contract* ſhare *equally*; except it be otherwiſe *provided*; and if either the ſhare of the *gain* or *loſſe* be expreſſed, the one *regulates* ſtill the other; but becauſe ſome *Mens pains* are of as great *value*, as other *Mens money*, therefore it is lawful and conſiſtent with the *nature of Society* to contract ſo, as that one may have the *half of the gain*, and no *loſſe*; but the *Contract* would be *null*, if it were provided, *that one ſhould have all the gain and no loſſe*, for there could

could be no *compenſation*, though the other were never ſo skil. ful. Book 3. Tit. 3.

By this *Contract*, all the *Partners* are obliged to advance for the *affairs of the Society*, according to the ſhares they have in it.

The *Society* is *extinguiſhed* *, and the *Perſons* who entered therein *looſed* therefrom by the death of any of the *Partners*; or by their becomiug *inſolvent*; except it be otherwiſe provided; for this is a *Perſonal Contract*, wherein Men reſpect the Humour and induſtrie of one another; and ſo this Contract is diſſolved, by the *ſimple Renunciation* of any of the Partners; ſo that every one has a *Negative Vote*, and if the Society be entered into, with this condition, *that it ſhould not be diſſolved at the option of any of the partners* Wayes of diſſolution of Society.

Book 3. Tit. 3. *partners*; *the Law does reprobate ſuch Pactions*; and from the *ſame principle* likewiſe it is, that *partners* in a *Society*, are not lyable *for farther diligence*, than they uſed to *adhibite* in their own *affairs*; having *voluntarly chooſed* one another for *partners*; for it is preſumed they are *ſatisfied* with one anothers *diligence*, the *contract* being entered into for the *behoof* and *profite* of all the *partners*.

* Mandate. * *Mandate*, is that *Contract* whereby *one imployes another to do*, or *manage any buſineſs*, *gratuitouſly*; for if he who is *employed* get a *reward*, it is not properly a Mandate, but *Locatio operarum*, or *a feeing of the perſon* ſo employed; but yet if the *receiver* of the *mandate* has been at any *expenſe* upon the *account* of the *mandate*, the *employer* muſt pay it.

He

He who receives the *mandate* is obliged to *execute the ſame*, according to the *rules preſcrived* by the *employer*, and not to exceed the bounds of his *mandate*; And therefore if *Titius* imployed *Seius*, to buy him ſuch a particular piece of Land for a 10000 *lib.* *Titius* is obliged to *ratifie his bargan*, though he buy it for 9000 *lib.* becauſe *ten* comprehends *nine*; but if he pay 12000 *lib.* for it, he is not obliged to ratifie the Bargan; becauſe he exceeds the bounds of his Commiſſion. Book 3. Tit. 3.

Mandates, expire either by the *revocation* of the Employer, if the thing or buſineſs in which he was employed be intire; or by the death either of the perſon employed, or of the Employer. or by the *renunciation* of the perſon employed; but in all thoſe caſes; if the *thing under-*

Book 3. Tit. 3.

taken be not intire; the perſon employed or his *Heir* may and muſt proceed to *execute the mandate*, notwithſtanding of the *Revocation*, *Death*, *or Renunciation*.

Diligence of Mandatars

Mandatars are lyable for *exact diligence*, *& culpa leviſſima*; becauſe albeit the *Mandate* be only *gratia Mandantis*; yet the *very nature* of it implies *diligence*.

Div: of Mandates

Mandates, are either *expreſs*, *ariſing* from *expreſs conſent*; or *tacit*, which are inferred by *Signs* and *Taciturnity*; as for inſtance, if a *Perſon preſent* ſuffers another to *act in his affairs*; he is underſtood to give him thereby a *tacite mandate*.

Gen. & ſpecial Man.

Secundo, *Mandates* are either *general for managing all affairs*; *or ſpecial*, for doing ſome *particular buſineſs*, conform to the *preciſe tenor* of the *commiſſion*; and albeit *general mandates* contain

tain moſt ample power of *ad miniſtration*; yet they are not extended to *commiting of Crimes*: Or, Book 3. Tit. 3.

Secundo, to *Donations*; albeit where there is any probable cauſe, *gratifications* may be allowed; which will be regulated *ſecundum arbitrium boni viri*; this being *contractus bonæ fidei*, which implyes *exuberant truſt.*

Tertio, No *General Mandate* will imply a power to *alienate Immoveables*; or to ſubmit or tranſact any *litigious buſineſs.*

Quarto, If in the general *Mandate* ſome ſpecial caſes are expreſt, it will not be extended to caſes of greater importance, than thoſe expreſt.

The great *favour of commerce*, has introduced another kind of *tacit Mandate*; by which *Exercitors of Ships*, and *Prepoſitors*

Book 3. Tit. 3.

tors are obliged by the Contracts of the *Masters of the ships*, and of the *Institors*, in relation to the Ships and Voyages; or to the particular *Negotiations* wherein they are intrusted.

Exercitor.

Exercitor, is he to whom the profit of a Ship doth belong; whether he be the *Owner*, or hath only *freighted the ship*; the *Master* is the person intrusted with the *charge of the ship*, who has power to oblige the *Exercitor*, by *contracting for the reparation, and outrigging of the ship* and in matters relating to the *Voyage.*

Institor

Institors, are intrusted with *particular Negotiations at Land*, such as keeping of Shops, *&c.* and they oblige their *Prepositors*, in relation to the affair wherein they are intrusted, as *Exercitors* are in *Maritime affairs.*

Neither

Neither the *Maſter* of ſhips, nor *Inſtitors*, need ſhew their *Commiſſion*, but their being in the *Office* is ſufficient to oblige the *Exercitors*, and *Conſtituents*. And if there be *many Exercitors* the *Maſters contract* obliges them all *in ſolidum*; albeit what was borrowed be not employed for the uſe of the *Ship*; only it muſt be known to the *Lender*, that the *Ship* ſtood in need of ſuch *Reparations*; and the *facts* of the *Inſtitors*, will oblige their *Conſtituents* of whatſoever *Sex* or *Age* they be; and even though they be *Pupils*, *Minors*, or *Wives*, who cannot *validly oblige themſelves*; for they have themſelves to blame who Intruſted ſuch Perſons. Book 3. Tit 3.

As all thoſe *Obligations* and *Contracts* ariſe from *expreſs conſent*, ſo others ariſe from *tacit con-*

Book 3. Tit. 3.

conſent; ſuch as *Homologation*; as for inſtance, though a man be not obliged by a bond granted in *Minority*; yet if he pay a part of it, or *annualrent* for it, after he is *Major*; the *Obligation* is thereby *homologated* or *own'd*, and becomes *valid*; not from the time of the *Homoligation*, but from the date of the *Write*; and therefore it is fit that ſuch as deſign not to *own*, *null*, or *invalid deeds*, ſhould abſtain from doing any thing, that may *inferr* an *Approbation* of them; but becauſe *Homologation*, is *actus animi*, therefore it ſhould not be proven by *witneſſes*.

Homologation.

Becauſe all *Obligations*, cannot be bound up under *general* and *regular names of Contracts*; therefore the *Law* allows ſome *Obligations*, to paſs under the name of *Quaſi Contractus*; be-

Quaſi contractus

cauſe

cauſe they have the *reſemblance*, and are of the nature of *contracts*; and theſe are *Negotiorum Geſtio*, whereby if any perſon manage your *buſineſs advantagiouſly* for you; you are lyable to him for his *expenſe*; though you gave him no *Mandate*; leaſt ſuch as are abſent ſhould be *prejudged* by the *negligence* of their *Friends*; and their averſenes to medle with other peoples affairs where they are to have nothing allowed them for their expenſes; As the *Manager* is lyable to refound to the *Perſon whoſe affairs* he *managed*, any *prejudice* done to him ſince, elſe any man might be *invited officiouſly*, to medle in another mans affairs to his *diſſadvantage*, but this is to be underſtood, *ſi inutiliter geſſeret*; otherwiſe if he *acted profitably*; albeit the event do not

Book 3. Tit. 3.

Negotiorum Geſtio.

Book 3. Tit. 3.

not ſucceed, he will get his *expenſes.*

The other *quaſi contractus*, are *Tutorie, communion of goods, entring Heir, the Obligation of repayment that ariſes upon payment of what is not due*; For if one be Tutor to you, he enters in a kind of Contract with you, whereby he is bound to adminiſtrate your Affairs, and you are bound to pay him his Expenſe; But of all theſe I have treated elſewhere in their proper places, as I ſhall do of *Malefices*, and what reſembles them; when I come to treat of Crimes, of which theſe may be properly ſaid to be *branches.*

Tutory

Having thus treated of *Principal Obligations*; the only *Acceſſory obligation* that I need mention is *Cautionary*; whereby one

Cautionary

one man becomes *ſurtie for another*; either to pay a *ſum*, or perform a *deed*; betwixt which two, there is this difference, that theſe that are *Cautioners for a ſum*, if they be bound conjunctly and ſeverally, with the *principal Debitors*; may be purſued without purſuing the *Principal*: and *quoad* the *Creditor* they are *Principals*; but theſe who are *Cautioners* for performing of *deeds*; as *cautioners for Executors and for curators*, or *Factors*, or for *Meſſengers*, cannot be purſued till the principal be diſcuſſed, for they being only obliged, that their *Principals* ſhall *compt*, or be *honeſt*; therefore they cannot be lyable untill the *Principals* firſt be cited to compt in the one Caſe; or to anſwer for their *Delinquencies* in the other; and they are onely lyable to make

Book 3. Tit. 3.

make up what is wanting from their *Principals* after they are diſcuſt.

Becauſe *Cautioners* for ſums bound *Conjunctly* and *ſeverally*, are lyable as *Principals*; therefore their *Obligation* may ſubſiſt; though the *Obligation of the Principal Partie* be found *null*, or reduced by any priviledge given to the *Principal* by Law; as if a Man become *caution* for a *Minor*; or for a woman who is married, *Nam ſibi imputet*, who became a *Cautioner* for ſuch; but if the *Obligation* was abſolutely null in it ſelf; as if the *Principal* did not ſign, then this *Obligation* becauſe it is but *acceſſory*, retains ſo much of its own *nature* as to free the *cautioner*

Relief of Cautioners.

Cautioners, are to get relief from their Principals, not only of the principal ſums, and annualrents; but of all dammage and intereſt;

and whether the ſame be provided by the bond or not; and where there are many *Co-cautioners*, they are lyable *in ſolidum*, *quoad* the *Creditor*; But if any of them pay the whole ſum to the *Creditor*, though he get aſſignation from him to the whole; yet he muſt only ſeek his Relief from the other *Cautioners*, with *deduction of his own part*, which procceds; albeit there be no clauſe of *mutual Relief* in the Bond; and they muſt communicate to their *Co-cautioners*, what eaſe they get by way *of Tranſaction* from the *Creditor*; but if they get the ſaid eaſe by a meer *Gratification*, as by *Donation*, *&c.* then they are not bound to communicate what eaſe they get; for a *Creditor* may juſtly gratifie one of his *cautioners* as his Friend, or Relation

Book 3. Tit. 3.

tion, without being obliged to gratifie the reſt.

ſubject matter of obligations.

To make *Obligations* effectual, it is neceſſar that the ſubject matter thereof be ſuch as will admit of an *Obligation*; For, no man can oblige himſelf, to do what is either *impoſſible*, *unlawful*, or *diſhoneſt*; nor to tranſmit the *property of* things *Sacred*; (theſe not being in *comercio*, and albeit when the *Performance of Obligations* becomes impreſtable, the *Party* is lyable for the Value, as *Dammage* and *Intereſt*; yet in theſe the Value is not *due*, nor will he be lyable in a *penalty*, in caſe of not *performance*.

But yet a Man may oblige himſelf, to do ſomething not in his own power; as to cauſe another *diſpone Lands*; and if he fail, he will be layable *pro damno & intereſſe*; or for the *penalty*.

A-

Amongſt *Obligations*, *Donation* is alſo reckoned, which is an *obligation proceeding from a Lucrative cauſe* or *Title*; For he who *voluntary* and *gratuitouſly* promiſes to give any thing, is thereby obliged to deliver the ſame; and this *Voluntar giving*, is called, *a Donation*, which is in *Law* defined to be *A meer Liberality proceeding from no previous compulſion.* Book 3. Tit. 3. Donation

It may be *perfected* either by *Write*, or without it; but if without *Write*, it muſt be proven by Oath.

Donations, are either *Simple*, *Remuneratory*, or *Mortis cauſa*, that is to ſay, *Donations made in contemplation of Death.* Div. of Don:

A *Remuneratory Donation*, called Αντιδοσον, is when a Man *beſtowes any thing not gratuitouſly*, but to *requite and repay ſome good deed done*, *or to be done to him*; Remuneratory Donations

Book 3. Tit. 3.

him, and ſo is not purely a *Donation.*

Donation in Contemplation of Death

A *Donation in contemplation of Death*, is when the *Giver deſigns rather the perſon to whom he gifts, to have what is gifted, than any other; but wiſhis himſelf to have it, rather than him to whom he gifts it.* And therfore, though *pure Donations* are not *Revockable*, yet a *Donation Mortio cauſa* is; being of the nature of a *Legacy*; and no Donation is preſumed to be *Donatio Mortis cauſa*, except it appear to be ſo, either expreſly, or by ſtrong preſumptions, that the thing *gifted*; was only *gifted in contemplation of Death.*

Gifts, being a meer *Liberality*, are not preſumed; and therefore by *Our Law*, *Debitor non præſumitur donare quamdiu eſt debitor*: But this being onely a *præſumptio Juris*, may be

be taken off by ſtronger Arguments, juſtly inferring, that *Donation* rather than payment was deſigned. Book 3. Tit. 3.

Title IV.

Of the Diſſolution, or Extinction of Obligations.

HAving cleared how *Obligations* are conſtituted It remains now to conſider how they are *taken off*, and *extinguiſhed*; which is either by a *contrary conſent*, or by *implement* and *ſatisfaction.*

Since *Conſent* is neceſſary to the *conſtitution of obligations*, ſo a *contrary conſent*, whither by a *Diſcharge*, or *pactum de non petendo*; does diſſolve and extinguiſh Obligations; *nam nihil eſt*

Book 3. Tit. 4.

eſt tam naturale, quam eo genere quidque diſſolvi quo colligatum eſt; And therefore, if the *obligation* be conſtituted by *Write*, it requireth *Write* to the diſſolution thereof, which is called a *Diſcharge*; And *Diſcharges* require the ſame ſolemnities that *obligations* do; but yet, if the *obligation* was ſatisfied, *via facti*, as by *intromiſſion* with Rents of Lands, *&c.* It is probable by Witneſſes, as all Facts are.

Diſcharge.

Diſcharges, are either *general of all that Parties can ask, or claim*; *Or particular, of one particular thing or ſubject*: And in *general Diſcharges*, if any particular thing be expreſly diſcharged therein, the *general clauſe* will be extended to Particulars of no greater importance, than thoſe expreſly diſcharged.

Diſcharges general and particular

diſ-

Diſcharges do ordinarly bear a clauſe, *diſcharging all preceedings till their date*; and albeit they do not, yet three *conſecutive diſcharges*, doe preſume, that all bygones are ſatisfied, if they be immediately ſubſequent to one another, and granted by *Parties*, having power to *diſcharge* as *diſcharges* by *Heritors*, or *Chamberlains*, to their *Tennents*; and therefore diſcharges of 3. *Subſequent years* granted by *Merchants*, who bought the Ferm of theſe *years*, will not inferr the preſumption; but it will be inferred by Diſcharges for a part of the three years granted by the Father, and the reſt by his eldeſt Son, as Heir; the Diſcharges being in *Write*, containing a *diſcharge of the whole years Rent*; ſo that *partial Recipts*; albeit they extend to

Book 3. Tit. 4.

Apochatrium annorum.

Book 3. Tit. 4. more then the years Rent, will not preſume, *that all preceedings are payed*; neither one Diſcharge for three *ſubſequent termes*, or *years*, the *preſumption* being inferred from renuing *of the Diſcharges each year*, without Reſervation.

payment. *Obligations*, are *extinguiſhed* and *diſſolved* by payment, which is, *performing of the obligation* in *the preciſe termes thereof*, and is ſo *favourable*, that if it be made *bona fide*, *it diſſolveth the obligation*; albeit he to whom it was made, had no right; ſo payment made to a *Procurater* after the *Procuratorie was revocked* without the *payers* knowledge, will be ſuſtained; and payment made to *Miniſters ſerving the Cure*, though they have no *Title* to the *benefice*; will *liberate the Payers*.

Obligations are likewiſe fulfilled

ed by *acceptilations*, which is an *imaginary ſatisfaction*, whereby the *Creditor acknowledges to have got Payment when* he hath not, and has the *Effects* and all the *Priviledges of Payment*. Book 3. Tit: 4: Acceptilation.

Secundo, by *Compenſation*, whereby if the *Creditor* of a *liquid ſum*, become *Debitor* to his *Debitor*, in another *liquid ſum*, the two *Obligations extinguiſh* each other *ipſo jure*; and is *equivalent* to *payment in all* caſes, but if the *ſums* be not *liquid*, or if a *ſpecies* or *body* be craved to compenſe a *liquid ſum* it will not be allowed. Compenſation.

Tertio, *Obligations* are taken away by *Innovation*, which is, the *changing one obligation for another*, and if the perſon of the *Debitor* be changed, it is called *delegation*. Innovation.

Innovation is never preſumed

Book 3. Tit. 4. except it be *expreſly mentioned*, or that the *obligation* bears expreſly to be in *ſatisfaction of the former.*

Confuſion. *Quarto*, *Obligations* are extinguiſhed by *Confuſion*; that is to ſay, when the *Debt* and *Credit* meet in the ſame *Perſon*; as when the *Debitor* ſucceeds to the *Creditor*, or the *Creditor* to the *Debitor*; or a *Stranger* to both; and the reaſon of the *Extinction* in theſe caſes, is, becauſe the ſame *Perſon* cannot be both *Debitor* and *Creditor.*

Title

TITLE V.

OF ASSIGNATIONS.

NOt only Moveable, but Heritable Rights whereupon no Infeftment has followed, and all Incorporeal rights requiring no Infeftment, ſuch as *Reverſions*, *Patronages*, *Servitudes*, &c. are Tranſmiſſible by Aſſignation; But if Seaſin be once taken on an Heritable Right it cannot thereafter be Tranſmitted by Aſſignation but by Diſpoſition, *which is a Write Diſponing Lands or other Moveable Rights containing a precept of Seaſin and Procuratory of Reſignation*; And tho a Liferent at firſt is to be compleated by a Seaſin as differing from other Heri- Aſſignation.

Book 3. Tit. 5.

table Rights only in its Endurance; Yet being once compleated, it may thereafter be tranſmitted by Aſſignation; for it continues not then to be a formal Liferent Right in the perſon of the Aſſigney, But reſolves only in a Temporarie Right during the Cedents Lifetime.

Cedent and Aſſigny

He who grants the Aſſignations is called the Cedent, and he who receives it, is called the *Aſſigney*.

Intimation.

An Aſſignation is alſo compleated by Intimation; and therefore in competition betwixt diverſe aſſigneys, the firſt *Intimation* is alwayes preferred; This *Intimation* is made by a *Procurator*, who takes *inſtruments* in the hands of a *Notar*, that ſuch an *Aſſignation* was *intimated*, (ſo that one man cannot be both *Notar* and

and *Procurator*;) and if after this the *Debitor* pay the *Cedent*, he muſt repay it to the *Aſſigney*; becauſe the *Cedent* was denuded by the *aſſignation*; and the intimation puts the *Debitor* in *Mala fide* to pay the *Cedent*; and for that ſame reaſon, the *Cedents oath* will not prove againſt the *aſſigney*, if the *Aſſignation* be for an *Onerous cauſe*. Book 3. Tit. 5.

But if the *Aſſignation* be *Gratuitous*; or for the *Cedents* behoof; or if the matter be *litigious*, the *Aſſignation* being after a *depending Proceſs*, in any of theſe caſes the *Cedents oath*, will prove againſt the *Aſſigney*.

A *purſute* or *charge of horning* upon the *Action aſſigned*, has likewayes the *force* and *effect* of an *intimation*.

The *Debitors* private know-

Book 3. Tit: 5: ledge of the *Aſſignation*, is not equivalent to an *intimation*; but his paying a part of the *ſum*, or *annualrent* for it, is equivalent to an *intimation*; and much more the *writing a letter* promiſing to pay; ſince that is in effect a *renewing the Obligation.*

Bills of Exchange, and *orders by Merchants* to pay, need not be *intimated*; becauſe in *Commerce*, we are Governed by the *Law of Nations*; nor need *Aſſignations* to *Reverſions* be *intimated*; becauſe the *Regiſtration* is a *Publication* of them. (The Regiſtration of *Seaſines* and *Reverſions* being deſigned for *publication*;) But the uſeing Inhibition againſt the *Cedent* upon the *Aſſignation* is not equivalent to an *Intimation*, the chief deſign of Inhibitions being for Execution and not for *publication.*

Legal

Legal and *Judicial Aſſignations*, ſuch as *Appriſings*, *Ajudications*, and *Marriage*; need no *Intimation*; and that becauſe they are paſt, and expede publickly. Book 3. Tit. 5.

A *Blank Band* is equivalent to an *Aſſignation*; and ſo muſt be intimated; and in *competition* with other rights, it is only preferred according to the date of the *intimation*, that the receivers name was filled up in it. Blank Band

It is a *general principle* in Our *Law*, *that in the competition of moe Creditors, the firſt compleat diligence is ſtill preferred*; And therefore, an *Aſſignation* is preferred to an *Arreſtment*, if it be *intimated* before the *Arreſtment*; but if the *intimation* and *Arreſtment* be in one day, they come in *pari paſſu*; except

Book 3. Tit. 6. cept the *Arreſter* be in *mora*, and do no *diligence* upon his *Arreſtment*. Or, that both Diligences expreſs the hour of the Day, and the one be prior to the other.

TITLE VI.

Of Arreſtments and Poyndings.

THE *ordinany Diligences*, in *Our Law*, affecting *Moveable Rights*, are *Arreſtment*, which anſwers to *Inhibition* in *Heritage*, and *poynding* which anſwers to *Compriſing in Heritage*,

Arreſtment. *Arreſtment* is the *Command of a Judge, diſcharging any Perſon in whoſe hands the Debitors Moveables are, to pay or deliver up the ſame, till the Creditor who has procurred the Arreſtment to be laid on, be ſatisfied.*

Ar-

Arreſtments may be laid on, Book 3. Tit. 6.
by any *Judge* in whoſe *Territories* the goods are; or by the *Lords of the Seſsion* wherever they lye, and that by *ſpecial letters of Arreſtment*; or by a warrand expreſt in the *ordinary letters of Horning*: theſe *letters* are executed by a *Meſſenger*, and if after it is laid on, the *party* in whoſe hands it is made, *pay*; he may be forced to pay the ſame over again, or may be purſued *Criminally* for breaking *Arreſtment*, the puniſhment being *confiſcation* of *Moveables* and their perſons to be in the *Kings will* *. *K. J. 6 par. 7. Act 118

Arreſtment can only affect *moveables*; But all ſumes of money due by bonds whereupon no infeftment has followed are *Arreſtable* *; And as *moveables* can only be *Arreſted*, ſo the ground thereof *K. C. 2 par. 1. Sef. 1. Act 51

must

Book 3. Tit. 6. muſt only be for payment of Moveable debts, *or ex paritate rationis* for payment of ſuch debts, which are not ſecured by infeftment, and it reaches only to the ſums already due, or for which the *year* or *term* is *current.*

How ſoon an *Action* is raiſed againſt a *Perſon*, his *Goods* may thereupon be *arreſted*, and this is called an *Arreſtment* upon a *Dependence* *; but this *Arreſtment* may be looſed by *letters* for looſing of *Arreſtment*, which paſſes upon a *Common Bill*, and a *Band of Cautionry* is given to the *Clerk of the Bills* *, wherein the *Granter* of the *band* obliges himſelf to pay the *ſum*, if the *Arreſtment* be found *lawful*, and the *ſums or goods decerned*, to belong to the *Arreſter*; but *Arreſtments* upon a *Decreet*, (or which is *equivalent*) on a

Areſt: upon a Depen:

*K. J. 6 par. 22. Act 17.

Re-

Regiſtrate Band, cannot be looſed at all; Except the Decreet be turned into a Lybel, that is to ſay, the Lords do only ſuſtain the Decreet as a Lybel or *Summonds* againſt the Defender, or that the Areſtment was laid on after the Decreet was ſuſpended; for in either of theſe caſes Arreſtments may be looſed even upon Decreets. Book 3. Tit. 6.

Arreſtment being but a *Perſonal prohibition* againſt the Defender to pay, it laſts no longer than the lifetime of him in whoſe hands the Arreſtment is made; except it be renewed againſt his Succeſſors; but it dyes not with him in whoſe Favours it was raiſed, nor with him for whoſe Debt it was laid on, and if the Debt be not *liquid*, the *Debitors Repreſentative* muſt be called to the *Liquidation*. In

Book 3. Tit. 6.

Competition of Arreſtment

In the *competition* amongſt moe *Arreſters* preference is granted according to the *priority even of hours*; and the firſt Arreſtment is not preferred, if the *poſteriour Arreſter* get the firſt Decreet, to make the arreſted Goods forthcoming; for Arreſtment, being only an *inchoated diligence*, it is compleated by the ſentence to make forthcoming; and yet if the Arreſter did exact diligence to obtain a Decreet; his raiſing the firſt purſute will prefer him. He alſo who Arreſts on a *Decreet*, will be preferred to him who arreſts on a *Dependance*; and he who arreſts after the term of payment will be preferred to him who arreſts before the term, *cæteris paribus*.

The *Kings Penſions* and *gratuitous Aliments* cannot be arreſted; becauſe they are given for

for a particular and favourable uſe; and not applicable to the Arreſter. Book 3: Tit: 6:

Poynding may be likewiſe uſed againſt Moveables by vertue of *letters of Horning* againſt the Debitors containing *poinding* or any other inferiour *judge*, his *Decreet* or *precept* * which is done by a *Meſſenger* after the dayes of the charge are *expired* * the form thereof is; The *Meſſenger* after *poynding* the goods, *appryſes* them upon the *ground* where he *apprehends* them; and offers them to the *Debitor*, for the *ſum* for which they were *appryſed*, and if he compear not, he *carries them to the mercat croſs of the head burgh of the ſhire*, or other *Juriſdiction* where they are *poinded*, and there he *appryſes them*, and delivers them to the *Party*, who is called the *Poynder*: but if any

poynding:

*K. J. 6 par. 12: Act 10 K. C. 2. par. 1. Seſſ. 1. Act 29.

*K. C. 2 par. 1. Seſſ. 1. Act 4.

Book 3. Tit. 6. any compear, and offer to *make Faith that the goods belong to them*, and not to the *Debitor*; then the *Meſſenger* muſt deliver them to that *Party*, elſe he is lyable in a *ſpulzie*.

Poynding, is a *judicial ſentence*, and the *Meſſenger is Judge conſtituted by the letters*; *the Meſſenger writes likewiſe an execution of poynding*, and that *execution* is better believed then any who offers to prove the *contrare*; for that *execution* is onely quarrelable by *improbation*.

Arreſtment, being but an *inchoated diligence*, diſcharging the *partie* in whoſe hand the *Arreſtment* is made, to pay, the *right* to the *goods arreſted*, remain ſtill in the *Debitor*, and may be *poinded for his debt*; for *poynding is a compleat diligence*, giving an abſolute right to the *goods poynded*.

Poynding cannot be after the Sun is set; For it is a Sentence. Book 3. Tit. 7.

Labouring *Oxen*, or other *Plough Goods* cannot be *poynded* in time of labouring (least labouring should be otherwise discouraged;) except there be no other Moveables upon the ground to be poinded *. Labouring oxen. *K. J. 4 Par. 6. Act 98.

Title VII.

Of PRESCRIPTIONS.

PRescription being a *way of evacuating and annulling both Heritable*, and *Moveable Rights* comes in here, after both these are explained.

Prescription is defined, an *Acquisition of Propertie by the Possessors continuing his possession for such time as the Law determines*; Which was introduced not onely for punishing the *negligence* Prescription.

Book 3. Tit. 7.

genee of the Proprietar, who owned not his Right for so many years; But likewayes, for securing Possessors, and such as derived *Right* from them; and least by a constant uncertainty, the Possessors being unsecure, might neglect the *improvement of what they possessed.*

Prescr: of Heritable Rights.

Heritable Rights, (under which I comprehend *Wadsets*, *Heritable Offices*, *Servitudes*, *Patronages*, *&c.*) and all Actions depending upon them, or relating to them, prescrive with us in 40. years; if the *Possessor* being a *singular Successor*, have a *Charter*, *Disposition*, or *Precept*, and *Seasin* in his Person; or being an *Heir*, have a constant tract of *Seasins*, continuing and standing together, for the space of 40. years, flowing upon *Retoures*, or *Precepts*

cepts of Clare constat: For, the *Law* did not trust a *Seasin* alone, it being onely the *assertion of a Notar*. But *Reversions* which are in the body of the Possessors Right; or Reversions duely *Registrated*, prescrive not. Book 3. Tit. 7. K J. 6. par. 22. Act 12.

All *Personal Rights*, and *Actions* relating to them, prescrive likewayes in 40. years; If a *Document* be not taken upon that Right, that is to say, *If nothing be done, whereby the true Proprietar declares his Intention to follow and own his Right* *. Prescrip: of personal rights.

In both these *Prescriptions*, the extroardinary length of time, supplies the want of *bona fides* in the *possessor*. But by the Civil Law, *things Sacred, Religious* or *Publick*, could not be prescrived, nor yet things Robbed or stollen, there being a *vitium* real, which afects all those things, *K. J. 3 par. 5. Act 29 par. 7. Act. 55.

Book 3. Tit. 7. things, but whither this will hold in our Law, is neither clear by our Statutes nor Decisions

prescriptions of particular Actions. *Actions of Spulzie*, and *Ejection*, prescrive in three years, after committing thereof; as to the *specialities* of these Actions, *viz.* The violent *profits*, and *Oath in litem*; But *Minors* have three years after their *Majority* *.

*K. J. 6. par. 6. Act. 82. As do also Actions for *Servants Fies*, *House meals*, and *Merchant compts*; except they can be proven after these three *years* by the *Debitors oath* *: And removings, if Action be not intended without three years after the warning * and in these last prescriptions Minority is not excepted.

*K. J. 6. par. 6. Act. 83.

*K. J. 6. par. 6. Act 82.

Assysers If *Assysers* err in serving a man wrongously *Heir*, to his *Predecessor*, the *Retour* may be quarrelled within 20. years; but

but the *Assysers* themselves can only be pursued for *Error*, within three years *, but the right of *Blood* it self never Prescrives; and therefore a man may be *served Heir to his Father or Grand-Father*, after a 100 years, being debarred by no time; *nam jura sanguinis nullo jure civili adimi possunt*; But this is to be understood where there is no service, for if there be once a service tho of a Wrong Person, it cannot be quarrelled after Twenty years. Book 3. Tit. 7. *K. J. 9. par: 22. Act 13.

If a Person who is *forefaulted possessed Lands as Heritable Tennant* for 5 *years*, before the *forefaulture*, without interruption, the *King* is obliged to show no Right, in the person of him who was *forefaulted* to the Lands, or others that he possessed; because its presumed, that the person *forefaulted* would

Book 3. Tit: 7. would abstract the *writs*, which *quinquennial possession* is to be tryed by an *inquest of the Shire*, *where the land lyes*. And if the *K. J. 6 par. 9. Act 2. *Traitor* was in possession the time of the *Forefaulture*, tho he possessed not 5 years before the *forefaulture*; the *King* or his *Donator*, must be continued in possession for 5 years, that in the mean time the *Traitors* Tacks and other Rights may be sought out.

Arrestments on *Decreets* and *depending Actions* prescrive with in five years, *viz.* *Arrestments on depending actions* 5 years after *sentence* and on *Decreets* 5 years after their date.

Meals and *Duties* due by *Tennents prescrive*, if not pursued within five years, after the *Tennents* removing; *Ministers stipends*, and *multures* prelcrive, so that they cannot be pursued after

after five years, except they be proven by the *Dibitors oath*, or by *Write*. Book 3. Tit. 7.

Holograph Bands; and *subscriptions* in *compt books*, prescrive in Twenty years, except they be proven by the *debitors oath*.

And lastly, all *Bargans* probable by witnesses, prescrive as to that manner of probation, if not persued within five years after their date; all *Actions on warnings, spulzies, ejections, Arrestments, Ministers stipends*, &c. *prescrive* within ten years; unless wakned every five years; but this alters not any shorter *prescriptions* of these *actions* *. *K. C. 2 par. 2. Sess. 1. Act. 9.

And for clearing the meaning of the statute appointing these prescriptions, by a late statute *Anno* 1685. it is ordained that, all those Actions mentioned in

Book 3. Tit. 7. in the said Act 1669. which were intented or depending before the date of the said Act 1685. should prescrive within 5. years thereafter, if they be not wakened within that time; and all Actions to be intented after the said Act should prescrive within five years if they be not wakened within that time.

All these *prescriptions* run *de Momento in Momentum*; so that the *prescription* runs till the last moment of the time allowed; but they run only from the time wherein the debt could have been pursued, since till then the *Proprietar* could not be called negligent, which negligence is the main foundation of *prescriptions*; and therefore *prescription* runs not against a *Band* from the date thereof; but only from the term

term of payment; and *preſcription* of an action of *Warrandice*, runs only from the *Eviction**; becauſe no man is lyable in *Warrandice*, till the the Lands be *Evicted*; and from the ſame *principle* it is, that *Contra non Valentem agere non currit Preſcriptio*; and that *Preſcription* runs not againſt *Minors* in moſt Caſes, in whom Negligence is not Puniſhable, ſince it proceeds from no *Deſign*; but from the *Unripneſs* of of their *Age*. Book 3. Tit. 7. *K. J. 6. por. 22. Act 12.

Vaſſals cannot preſcrive againſt their *Superiours*; becauſe the *Vaſſals right* acknowledges the *Superiours*; nor can *Laicks* preſcrive a right to *Teynds* being incapable of ſuch rights after the *Lateran Council*; but though the right it ſelf preſcrives, in neither of theſe caſes, yet the bygones due

Book 3. Tit. 7. by *Vertue* of these rights before *Fourty years*, may *prescrive*.

Prescription runs against the *Kirk, and Mortifications*; but on the other hand, because *Church men are negligent*, and *rights* may be *lost* in the *change* of *Intrants*; therefore, 13 *years possession*, is sufficient to maintain a *Church man in possession*; which is called, *Decennalis & Triennalis possessio*; and is a *presumptive title*, and sufficient till a better be shown, by which it may be excluded; *for præsumptio cædit veritati.*

Prescription. *Prescriptions* run likewayes against the *King*; except as to His *Majesties annext propertie*; or to his *un-annext property*; whereof the *ferms*, *duties*, or *feu ferms*, have been compted for in *Exchequer*, since *August* 1455 years *.

*K C. 1 par. 1. Act 12.

Any deed, whereby the *true*

true proprietar owns his right, during the course of the *prescription*, is called *interruption*; and *prescription is interrupted* in *Our Law*, either by a *process*, or a *charge raised within the years of the prescription*; and a citation on the first *Summonds*, *Interrupts*, tho therafter past from *pro loco & tempore*; But registration of a write interrupts not prescription; And *interruption* by *citation*, is not sufficient unless it be made by *Messengers* personally or at the parties dwelling house, and that it be renewed every seven years *; and that the *Execution* be signed by the *Messenger* and *witnesses*.

Book 3. Tit. 7.

Interruption.

*K.C. 2. par. 2, Sess. 1. Act 9.

Diligence used upon a write interrupts, as to all parties concerned therein, for it hinders the write it self to prescrive; And therefore diligence against any of moe prin-

Book 3. Tit. 8. cipals or againſt any of the *cautioners*, Interrupts *preſcription*, *quoad* the whole principals and *cautioners*; & interruption as to a part interrupts the *preſcription* of the whole; ſo that if a man *arreſt* the meals and duties of any part of a *Barrony*, he interrupts *preſcription*, as to the whole *Barrony*.

TITLE VIII.

Of Succeſſion in Heritable Rights.

HAving formerly ſhewed how *Rights* whether *Heritable*, or *Moveable*, *Real*, or *Perſonal*, are conſtituted, and how they are tranſmitted to ſingular *Succeſſors*: It remains now to conſider how theſe Rights are tranſmitted by Succeſſion, beginning firſt with Succeſſion in Heritage.

An

An *Heir*, is he that *ſucceeds univerſally to all that belonged to the Defunct*; and is therefore in conſtruction of Law, *one and the ſame perſon with the Defunct.* Book 3. Tit. 8. Heir.

Though the *Executor*, be in effect the Heir in *moveable Rights*; yet we call thoſe only *properly Heirs*, *who ſucceed in Heritage*; and with us there are ſeveral kinds of Heirs diſtinguiſhed by their ſeveral *denominations.*

The firſt, and chief kind of *Heirs*, are the *Heirs of Lyne*, who are ſo called, becauſe they ſucceed *Lineally*, according to the *Right of Blood*; and they ſucceed thus, Heir of Line.

Firſt, *Deſcendants*, accord to the *proximity of their Degree*, in which the eldeſt Son is preferred to all his Brothers, and all the Brothers to the Siſters, and if there be onely Deſcendants.

Book 5. Tit. 8. Siſters, they ſucceed all equally.

The next degree, is *Grand Children*, and their great *Grand Children*, *&c*, who ſucceed all in the ſame way.

Collaterals. If there be no *Deſcendants*, then *Collaterals* ſucceed, in which, the firſt degree is *Brothers*, *and Siſters German*, for the *whole blood excludes the half blood*; and Brothers the Siſters; and Brothers by the Fathers-ſide exclude Brothers by the Mothers ſide; there being no Succeſſion with us by the Mothers ſide.

Failing Deſcendants, and Brothers and Siſters, whether *German* or *Conſanguinean*, the Succeſſion aſcends firſt to the *Defuncts* own Father, who excludes all his own Brothers and Siſters, the *Defuncts Uncles* and *Ants*, and failing them the Father Brother (obſerving the ſame

ſame Rules formerly mentioned, in the ſucceſſion of Brothers and Siſters) and failing the Fathers Brothers and Siſters, the Grand-father; and after him his Brothers and Siſters the ſame way; according to the *Propinquity* of Blood and ſo upwards as long as any *Propinquity* can be proven, all which failing the *King*, ſucceeds as *Ultimus heres*. Book 3. Tit. 8.

It is to be obſerved that in *Heritage*, there is a *Right of Repreſentation*, whereby the *Deſcendants* exclude ſtill the *Collaterals*; though nearer by many Degrees to the Stock, or *Communis ſtipes*; And thus the *great Grand Child* of the eldeſt Son ſecludes the ſecond Brother; becauſe, he comes in place of, and ſo repreſents the elder Brother, his *great Grand Father*. Right of Repreſentation.

Book 3 Tit. 8.

The *Heir of Line*, has Right to the *Heirſhip Moveables*, and excludes all other *Heirs* therein; *Heirſhip Moveables are the beſt of each kind of Moveables*, which is given to the *Heir*; becauſe he is excluded from all other Moveables; if there be *Pairs*, or *Dozens*, he gets the beſt *Pair or Dozen*; but in others he gets only one ſingle thing; None have right to *Heirſhip Moveables*, but the *Heirs of Prelates*, under which are comprehended all *Beneficed Perſons*, the *Heirs of Barrons*, under which are comprehended all who are *Infeft in Lands* or *Annualrents*, though not erected in a *Barrony*; And the *Heirs of Burgeſſes*, by which are meaned, *Actual Trading*, but not *Honorarie Burgeſſes*; And if a Man was once a *Baron*, he is ſtill preſumed to continue ſo, except

Heirſhip Moveables.

except it can be proved, that he is deveſted; and that is the ſenſe of the *Brotard*, *ſemel Baro ſemper Baro.* Book 3. Tit. 8.

Heir of Conqueſt.

An Heir of *Conqueſt*, is he *who ſucceeds to the Defunct in Lands and other Heritable Rights, to which the Defunct did not himſelf ſucceed as Heir to his Predeceſſors*; as for inſtance what a Father leaves to a ſecond Son is *conqueſt*, tho he got the ſame from his Father, Becauſe he was not *alioqui ſucceſſurus*; But if the Father diſpone to his Eldeſt Son any part of his Eſtate this is not *conqueſt*, but *Preceptio Hereditatis*, becauſe he was *Alioqui ſucceſſurus*; And the *Rule* is, that *Heritage* deſcends and *Conqueſt* aſcends; ſo that if the midle of three Brothers dye; his immediate elder Brother would be his *Heir of Conqueſt*; and if a Son of a

Book 3. Tit. 8. *ſecond Marriage* dye, leaving *three Brothers of a former Marriage*, the youngeſt would ſucceed in his conqueſt lands; and this I conceive was introduced, for enriching the elder brothers, whom *Our Law ſtill favours*; whereas *Heritage* muſt deſcend according to the *Law of Nature.*

Theſe *Heirs of Conqueſt*, have right to all *Lands*, *Annualrents*, *Heritable Bands*, and others; whereupon *Infeftment* did or might follow, but they have no right to *Tacks*, *Penſions*, *moveable Heirſhip*; and all other *Rights*, having *Tractum futuri temporis*, and requiring no *Infeftment*, and ſo not *Competent to Executors*; all which belong to the *Heir of Line.*

Heirs Male. The *Heir Male*, is the neareſt *Male* who can ſucceed; and all *Heirs of Line*, are alſo called

led *General Hoirs*; becauſe they ſucceed by a General ſervice and repreſent the *Defunct* univerſally. Book 3. Tit. 8.

General Heirs.

The *Heir of Tailzie, is he to whom an Eſtate is Tailzied*, ſo called, becauſe the *legal Succeſſion* is cut off in his favours from the *French word, tailer, to cut*, and the matter of *tailzies* may be *Summed* up in theſe *few Concluſions*. Heir of Tailzie.

Firſt if a Fiar or Proprietar doe only ſubſtitute the perſons who are to ſucceed on to another, this is called a *Simple Deſtination*; And it may be broke or altered by the maker or by the reſpective members as they ſucceed, even tho an Inhibition were ſerved thereon, for there being no Obligation not to alter, there can be no foundation for an Inhibition.

Book 3. Tit. 8. *Secundo*, if the maker deſign that his *tailzie* ſhould not be altered, he either Adjects a Prohibitory clauſe *de non alienando*, and then tho the maker may alter it; yet neither the *Inſtituts*, nor *Subſtitutes* can alienate by any voluntar or gratuitous deed; for elſe that deed would be reduceable on the *Act of Parliament*, 1621, as done in prejudice both of the maker and of the *remoter Subſtitutes*, who are to ſucceed, and who are *Creditors* by the ſaid Prohibitory clauſe; Or Inhibition, may be raiſed upon the ſaid Prohibitory clauſe, after which the *Tailzied* Lands cannot be diſponed, even for an *Onerous cauſe*.

Tertio, If the maker Deſign that the tailzied Lands ſhould not be alienable, even for *Onerous cauſes*; then he adjects to the

the *Pactum de non alienando*, a *clauſe irritant* and *Reſolutive*, declairing all deeds done contrair to & in prejudice of the *tailzie* to be null & void, and in that caſe all Poſterior Alienations, even for Onerous Cauſes will be reduceable; tho no Inhibition be raiſed thereupon; And becauſe ſuch clauſes prejudge Creditors and commerce very much, and ſeem to be inconſiſtent with the nature of Propertie and Dominium, Therefore an * Act of Parliament was neceſſary for ſecuring them; & generally in all theſe caſes, the contrarveener prejudges not only himſelf, but all the *heirs* that might ſucceed by him, ſo that there is place for the next Subſtitute who may in either of theſe caſes, ſerve himſelf Heir to the Maker; tho generally a Ma[illegible] ſho[illegible]

Book 3. Tit. 8.

* King James 7 Par. 1. Act 22.

Book 3. Tit. 8.

ſhould be ſerved Heir to him who was laſt inſeſt) or he may ſerve himſelf Heir to the Contraveener who was laſt inſeſt, without being obliged to fulfil his Deeds.

Quarto, If a Man oblige himſelf to tailzie his land s, he is obliged once to tailzie; but not to continue the tailzie; but if the Obligation be made for an Onerous cauſe, the ſame is not revocable, as if the tailzie be mutual.

Quinto, Where Tailzies are made to two Strangers joyntly, and their Heirs . they ſucceed to equal halves; and they are both Fiars; But if lands be taken to a Man & his Wife in Conjunct fie and Liferent, and their Heirs, the Husband is Fiar, and the Wifes Conjunctfie reſolves only in a Liferent; and yet in Subſtitutions to move-

moveables, both their Heirs would ſucceed equally. Book 3, Tit. 8.

Sexto, In Conjunctfies theſe general Rules hold, that the Husband is Fiar, becauſe of the prerogative of the *Sex*; And that he is Fiar on whom the laſt termination falls; yet both theſe Rules hold only *preſumptive*, and may be overballanced with ſtronger preſumptions; As for inſtance, if the reverſion of lands belonging to the Wife as Heretrix, be taken to the Husband and Wife, and their Heirs; the Wifes Heirs would exclude the Husbands Heirs; For it is preſumable that the reverſion ſhould follow the Heritable Right; Or, if a Father ſhould take ſecurity in lands to himſelf, his Son, and their Heirs, the Father would remain Fiar, which does likewiſe hold, tho the ſecurity were

Book 3. Tit: 8. were taken to the Father and Son *nominatim*, and the Sons Heirs, even tho the Son were infeft; for it is preſumable that the taking infeftment was only deſigned to compleat the ſecurity, and to ſubſtitute the Son, but not to exclude the Father from his own Fie; And generally in all ſubſtitutions, the chief thing to be conſidered is, the deſign of the Parties.

Heirs of proviſion. *Heirs of Proviſion*, are theſe who ſucceed by vertue of a particular proviſion in the infeftment; ſuch as the Heirs of a ſecond Marriage; And as to theſe Heirs of Marriages, we may obſerve two things, firſt, That if a Father by his Contract of Marriage, be obliged to employ a ſum to himſelf, and the Wife in Conjunctfie; and the Heirs of the Marriage, he cannot in prejudice thereof do

do any *fraudulent gratuitous deed*, tho he may provide a Joynter to a ſecond Wife; or proviſions for his Children of a ſecond Marriage. Book 3. Tit. 8.

Secundo, Though a Father may aſſign or diſpone ſums to Children, when extant, whereby they will be preferred to poſterior *Creditors* as becoming *Fiars* by the ſaid Rights; yet if the Father diſpone to Children to be procreat, this will be conſidered only as a Deſtination and ſo will not hinder the Father to make poſterior Rights; or even poſterior Creditors to affect by Diligences what is ſo diſponed.

Tertio, *Proceſs* will be ſuſtained at the inſtance even of the appearend Heir of the Marriage, againſt the Father, to fulfill the ſpecial *Obligations* therein, or to purge any deeds already

Book 3. Tit. 8. already done by him in prejudice thereof.

Albeit, where Heirs are not ſpecially deſigned in any right, the *Heirs of Line*, exclude all other Heirs; yet if a Man take lands to himſelf and his *Heirs Male tailzie*, or proviſion; and thereafter acquire reverſions, or Tacks of the ſame lands to himſelf and his Heirs; theſe Rights will accreſs to that ſpecial Heir, to whom the land was provided; for it is not preſumable, that a Man would give the lands to one, and the rights of them to another Heir.

Heirs Portioners. When Women ſucceed, all theſe of one Degree ſucceed equally, and becauſe the Eſtate is divided amongſt them, they are called *Heirs Portioners*; the Eldeſt not ſecluding the Reſt, and having no advantage over them, But where the Rights

Rights are indiviſible, ſuch as *Titles*, *Juriſdictions*, *Superiorities*, and all the Caſualities of theſe Superiorities; ſuch as *Ward*, *Marriage*, *Nonentrie*, *Feu-duties*, *&c.* theſe fall all to the Eldeſt *Heir Female* without diviſion; together with the principle Meſſuage, it being a Tower, or Fortalice; for other houſes are divided equally. Book 3. Tit. 8.

All theſe Heirs are lyable for their Predeceſſors debts, *in ſolidum*, if they once enter Heir; except Heirs Portioners, who are only lyable *pro rata*, and Heirs *ſubſtitute* in a ſum, who are only lyable to Creditors, in the value of the Summ, to which they are ſubſtitute. But they have in SCOTLAND a Priviledge which they call the *Benefit of Diſcuſſion*, whereby the Heirs of Line muſt be firſt purſued, to *fulfil the Defunct's deeds* Benefit of Diſcuſſion.

Book 3. Tit. 8.

deeds, or *pay his debts*; And next to theſe the *Heir of Conqueſt*, the *Heirs Male*, the *Heir of Tailzie*, and *Heirs of Proviſion*; But for fulfilling a deed relating to particular lands, the Heir who ſucceeds in theſe particular lands, muſt be firſt purſued, without *diſcuſſing*; and that which is meant by *Diſcuſſing*, is, *that the Creditor muſt proceed by Horning, Caption, and Appryſing or Adjudication againſt the Heir*; who is to be *Diſcuſſed*, before he can reach the other Heirs.

Heir Active.

Heir Paſſive

An *Heir* is ſaid with us, to be *Heir active*, who is ſerved *Heir*, and may *purſue*, whereas he whom the *Law* makes lyable to be *Heir*, is ſaid to be *Heir paſſive*; As when the *appearand Heir is infeft* upon a precept of *clare conſtat* by the *Superiour*, or otherwiſe medles with his *Fathers Eſtate.*

When

When the *Predeceſſor dyes*, he who ſhould be *Heir*, (and therefore is called, *appearand Heir*,) has year and day allowed him to deliberate *whether he will be Heir*, which is called, *annus deliberandi* *; and which is indulged by the Law; becauſe if a man enter once Heir, he is lyable to all the debts though *far exceeding the Eſtate*; and within that year, he cannot be purſued, nor obliged to enter; but after the year is expyred, the *Creditor* may *charge him to enter Heir*, and if he reſolve not to enter, he muſt renounce any *Right* he has by a *writ under his hand*.

Book 3. Tit. 8.

Appearand Heir.

* Annus delib. K. Ja. 6. Par. 23. Act 27.

This year is compted from the *defuncts death*; except in a *poſthum Child*, who has a year allowed him, after his Birth, and not only during this

Poſthum Child.

Book 3: Tit: 7. this year; but after it expires, the *appearand Heir* without inſtructing any Title, may purſue for *exhibition of all Rights made to his Predeceſſors*; and of all Rights made by his *Predeceſſors*, to any in his own *Familly*; (but not to *Strangers*); to the end he may deliberate, whither he will enter *Heir*; the apperrand Heir may alſo defend his *Predeceſſors* right, and continue his poſſeſſion by purſueing for *Mailes* and *Duties* though he renounce. *vid. ſupra Book 2. Title 9. § Liferents.*

If the *appearand Heir* reſolves to *enter Heir to his predeceſſor*, he muſt raiſe *Briefs* from the *Chancellarie*; which *Brief is a command from the King*, to the *Judge ordinary*, where the lands lye, to cauſe try by an Inqueſt, conſiſting of 15. ſworn

ſworn men whether the *raiſer of the Brief* be *neareſt Heir*; and this is executed or proclaimed at the *mercat Croſs* where the lands lye; and if at the day appointed, the *Inqueſt* find him to be the next perſon who ſhould ſucceed, they *ſerve him Heir* by a paper, which is called a *Service*, and which being returned be them to the *Chancelcelarie*; there is a *write* given to the Heir; and which is called, the *Retour*, becauſe it is their anſwer, and return to the *Chancellarie of the points* contained in the *brief*; and thereafter, the perſon who is ſerved Heir is inteſt by Precepts out of the *Chancellarie*; which Infeftment muſt be given by the *Sherriff*, or his *Deputes* and the *Sherriff Clerk as Notar* thereto; and if the Service was to any *Particular Lands*, it is called a *ſpe-* Book 3. Tit. 8.

Book 3. Tit. 8.

a *ſpecial Service*; but if there was no *Land* deſigned, it is only called, a General *Service*; and this General Service may be before any Judge, and is ſufficient to eſtabliſh a *Right to Heritable Bands*, *Diſpoſitions*, *Reverſions*, *Juriſdictions*, and all other Rights, whereupon the *Defunct* was not infeft, nor needed to be infeft; and a ſpecial Service includes a general ſervice but not *è contra*.

General Brieff.

The *General Brief* hath only two *points or heads*, *viz.* if the *Defunct* dyed at the *Kings peace*; and if the raiſer of the *Brief* be the next Heir, but the *ſpecial Brief*, has *ſeven*, *viz.* when the *Defunct* dyed. *Secundo*, If he dyed laſt *veſt*, and *ſeaſed*, at the *Kings peace*. *Tertio*, That the *raiſer is next heir*. *Quarto*, Of whom the Lands are holden *in capite*. *Quinto*, By what manner

manner of holding. *Sexto*, What is their *Old and new extent.* *Septimo*, Whether the *raiſer be of lawful age*; and in whoſe hands the Lands are at preſent. Book 3: Tit: 7:

Sometimes likewiſe, the *Vaſſal* without ſerving himſelf *Heir*, gets a *precept of ſeaſin* from the *Superiour*; wherein, becauſe the *Superiour* declares, *That it is known to him, that ſuch a Man is Heir to his Father*; It is therefore called, a *Precept* of *Clare conſtat*; which therefore makes the Obtainer lyable *paſſive*, to all his *Predeceſſors debts* but gives him only *right active*, to the *Particular Lands* contained in the *Precept*, nor will it give him a right even as to theſe Lands, except againſt thoſe who derive right from the *Superiour* who gave it.

Bailiffs alſo of *Burghs Royal*,

Book 3. Tit. 7. do *Infeft* their *Burgeſſes in Burgage lands*, *by giving them *ſeaſin as heirs*, and delivering them for a *Symbole*, the *Heſp* and *Staple of the Doors*; and the *ſeaſin in that caſe*, is in place *of* a *ſervice*; as to theſe lands; but is not in other caſes a ſufficient *active title*; and theſe *Jeaſins* muſt be given by the *Bailies* and the *Common Clerk* of the *Burgh*, as *Notar*, otherwiſe they are null.

*K. J. 6. Parr. 1. Act 27.

The *Heir* who is *Retoured*, holds either his lands of the *King*, and then he gets *precepts out of the Chancellary*, to the *Judge Ordinary*, to *Infeft* him; which if he refuſe, the *Lords* upon a Supplication, will direct Precepts to any other Perſon, who is thereby made a *Sherriff in that part*; but if the lands hold of another *Superiour*, then either that *Superiour*

is

is himſelf entred or not; if he be entered he will be charged by *Four Conſequtive Precepts*, to enter the Heir; and if at laſt he diſobey, his immediate Superiour will be charged, and ſo till the *Heir arrive* at the King, who never refuſes to enter any; and if the *Superiour* be not entered, he muſt be charged upon 40 *Dayes to Enter*, that being himſelf entered, he may enter his *Vaſſal*; and if he refuſe, or delay he loſſes all the Nonentries of his *Vaſſal* during his Life; but no other Caſualities; becauſe *quoad* theſe he was not *Culpable*. Pook 3. Tit. 7.

Though the Perſon who ſhould be Heir, do not enter to his *Predeceſſors Heritage*; yet he may be made lyable to his Predeceſſors debt by two *Paſſive Titles*, relating to *Heritable*

Book 3. Tit. 7. *Rights*; *viz. Geſtionem pro hæredæ*, and as *Succeſſor titulo lucrativo poſt contractum debitum*, and there is a third *paſive title* relating to Moveables, which is called *Vicious Intromiſſion.*]

Behaving as *Heir*.

Behaving as *Heir*, or *Geſtio pro Hæredæ*, is when the Perſon, who might have been *heir*, immixes himſelf, and intromits with either the *moveable Heirſhip*, or any Heritable Eſtate, belonging to the *Defunct*; in which caſe, he is lyable to the Creditors, not only according to the value of what he intromitted with; but as far, and in the ſame manner as if he had been entered *Heir*; and yet the Lords will not ſuſtaine this *paſive title*, becauſe of its extraordinary hazard where the intromiſſion is very ſmall; or where he has colourable Title, to which he might

might aſcrive his *intromiſſion*, as a *Factorie* from the *Compryſer*; or the *Donator* to the *Eſcheat*, or *Recognition*, *Geſtio pro hærede*, being *Magis animi quam facti*, which *Factories* will defend; though there was no *Declarator*; but if the appearand Heir had no Factory, it is not ſufficient to alledge the Defunct dyed Rebel, and ſo could have no Heir; except his Eſcheate was declared before intenting the Purſuers Action; nor will this Paſſive title, nor *vicious intromiſſion* be ſuſtained beyond *ſimple Reſtitution*, except they be purſued in the *Intromitters*; own Lifes time, they being kinds of *delicts* Book 3. Tit 7.

But he will not be lyable, if the *Defuncts Right* was reduced, though after his intromiſſion; and ſince this Paſſive Title, was introduced by the *Lords of Seſſion*, in Favours

Book 3. Tit: 7: of the *Creditorr*, to deter *appearand heirs* from *Fradulent Intromiſsion*; therefore an *appearand heir*; paying his Predeceſſors debt will not infer this *paſive title*; ſince that is for the advantage of *Creditors*; nor will the getting of Money for ratifying a Compryſing that is expired, infer this *paſive title*, ſince the *Creditors* would have got no Advantage by that Right; but if the *Appearand Heir* had conſented before the Compryſing was expyred, it would be a *paſsive title*; becauſe as *Heir*, he might have redeemed the *Compryſing*, & if an appearand Heir grant bond to a confident Perſon for his own behoof & that confident perſon compryſes or Adjudges the Heritage thereupon his intromiſſion by vertue of that Appryſing will

not

not defend him * againſt this Paſſive Title whether the legal be expired or not but he will be lyable as if there were no ſuch Right in his Perſon.

Book 3. Tit. 7.

Act Sederunt, 28 Feb: 1662.

Succeſſor titulor lucrativo, is where the *Appearand Heir*, to preclude the neceſſity of entering *Heir* and ſo being lyable to the *Creditors*, gets a *Diſpoſition* from him to whom he would have been *Heir*, without any *Onerous Cauſe*; the receiving whereof, though it be a ſmall part of the Eſtate, makes him lyable to the payment of all the *Creditors Debt*; if the Right made, as well as the *Infeftment*, was Poſterior to the *Creditors Lawful Debt*. But if there be an *Onerous Cauſe*; then either it is not near equivalent to the value of the *Lands Diſponed*; and in that caſe, it will not defend againſt this *paſsive title*;

Succeſ. tit: lucr:

Book 3. Tit. 7. Or, if it be near to the *value*, it will defend againſt it, but not againſt *Reſtitution* of that *Value*. And ſince this *paſſive Title*, overtakes ſuch as might have been Heirs; therefore, a Diſpoſition granted to a *Grand Child* will make him *Succeſſor titulo lucrativo*, though the Father be alive; ſince by the *Courſe of Succeſſion*, he might in time have been Heir, though he was not immediate Heir; but ſince this can only reach appearand Heirs, therefore a Diſpoſition made by one Brother to another, though the Maker had no Children, will not make him *Succeſſor titulo lucrativo*, ſince the Brother might have had Heirs himſelf; and ſo his Brother was not his appearand Heir.

This *Paſſive Title* holds only in

in Heritage, and therefore, the *getting a right to moveable heirſhip and tacks, will not infer the ſame.* Book 3. Tit. 7.

Geſtio pro Hærede, and *Succeſſor titulo lucratio*, being *paſsive titles*, whereby *in odium* of the irregularity of the intromiſſion, they are made lyable as Heirs; therefore theſe paſſive titles, can extend no further, than if they intromit with, or take a *diſpoſition* to theſe things to which they might have ſucceeded; and ſo not inferred againſt an Heir of Tailzie, intromitting with, or getting a Diſpoſition of what would have fallen to the Heir of Line; nor can they be extended further, than if they had been ſerved Heirs; And thus an Heir portioner will be no further lyable in theſe, than *pro rata*, if ſhe had entered; for

Book 3. Tit. 7.

the coppy ſhould go no further than the Original.

Rights on Death-bed.

To conclude the Succeſſion in Heritage, it is fit to know, that by an *old Statute* *, and our *conſtant practique*, *a man cannot diſpone his Heritage upon death bed, in prejudice of his Heirs*; (that is to ſay, neither Lands, nor Heritable Bands, nor any Band, though Moveable, in ſo far as his Heritage may be thereupon Appriſed or Adjudged;) can be then Diſponed; ſo jealous was Our Law of the importunity of *Churchmen*, and Friends, and of the weakneſs of Mankind, under ſuch Diſtempers; And therefore, if a Man has made any Right in prejudice of his *Heir*, after contracting Sickneſs, though he was ſound enough in his Judgement for the time, and continued ſound for a very

* Stat: Will: Reg: cap: 13:

ry long time; yet this Right will be reduced, as done *in lecto*, or upon *Death-bed*; either at the inſtance of the appearand Heirs, or at the inſtance of the appearand Heirs Creditors; and it is ſufficient to prove ſickneſs, though it be not proved *mortal*, and that he was ſick; without proving that he dyed of that ſickneſs, or was ſick the very time of the Diſpoſition. Book 3: Tit: 7:

If thereafter, the Maker of ſuch a Right, *come to Kirk or Mercat unſupported*, the Law preſumes that the Maker was *reconvaleſced*; And ſo the Deeds *reconvaleſce* with him; But ſince the Law has fixt upon *Kirk* & *Mercat*, as open places, where the Diſponer may be ſeen by all Men, and by unſuſpect Witneſſes; *equivalent Acts*, as going to make Viſits, though at a greater diſtance, will not be

ſuſtain-

Book 3. Tit. 7. ſuſtained: But though a Man cannot grant a new Right upon *Death bed*, yet he may perfect an old Right; or do a deed to which he might have been otherwiſe compelled; as for payment of his Debt, or may grant a rational Joynter to his Wife; though he cannot grant Proviſions to his Children in that Condition. And all deeds done with the conſent of his Heir are valid, becauſe this Law is introduced in favours of Heirs, whether they be Heirs of Line, Male, or Tailzie or proviſion.

TITLE VIII.

Of Succeſſion in Moveables.

THE ſame Rules are obſerved, in the *Succeſſion of Moveables*, that were formerly ſpecified in the *Succeſſion of Heritage*; except as to theſe particulars, *viz.* all of one Degree ſucceed equally; and ſo amongſt *Brothers* and *Siſters*, the *Elder ſeclude* not the *Younger*; nor *Males* the *Females*, as in *Heritage*; and in *Moveables*, there is no *Right of Repreſentation* as in *heritage*; and therefore if there be a *Brother* and two *Siſters* alive; and a third *Siſters Children*, the *Brothers* and *Siſters*, who are living

Book 3. Tit. 8. will ſucceed equally, excluding the *Children of the Siſter* who is dead.

Teſtaments

A Teſtament, or *Latter will*, does require to be in *Write*, for *nuncupative Teſtaments*, (which were ſo called; in the *Civil Law*; Becauſe, the *Defunct* named his *Heirs* without *Write*) are not allowed by *Our Law*, by which a *Teſtament* muſt either be *holograph*, all written with the *Defuncts* own hand; or at leaſt, ſubſcrived by him before two Witneſſes, if he can Write; or if he cannot Write, by a *Notar*, or *Miniſter* and two *witneſſes*.

No *Heritable Right* can be left in *Teſtaments*, though the *Teſtator* was in *leidge pouſtie*, or perfect health; and though the *Teſtament* be made in other *Nations*, where *Heritage* may de diſponed by *Teſtament*; yet

yet it will not transmit a right to *Heritage* lying in *Scotland*; and yet a *Testament* made according to the *solemnities* of these *Nations*, will be valid in *Scotland*; for though they may regulate us as to *solemnities*; yet they cannot alter the nature, and so not the transmission of our *Rights*. Book 3. Tit: 8.

A Legacy, is a donation left by the Defunct in any Write to be payed by his Executor; But if the *Legatar* die before the *Testator*; or before the condition is fulfilled, on which the *Legacy was left*, then the *Legacy* evanisheth; and though neither other mens moveables, nor a mans own Heritable Rights, can be left in *Legacy*; yet such *Legacies* are valid, if the *Testator* knew that the sum left was heritable, or belonged to others Legacy

Book 3. Tit. 8. others; and the *Executor* in those cases must pay the value.

A *Minor* being above 14. years, may make a *Testament*, without the consent of his *Curators*; but under 14. years he can make none. A *Wife* may make a *Testament* without the consent of her *Husband*. And a person *interdicted* without the consent of the *Interdictors*; but *Idiots*, nor *furious persons*, can make none; except in their *lucit. intervals*; nor *Bastards*, except they be *Legittimated*, or have Children of their own.

Jus Relictæ.

If a Man be *Married*, the *Wife* has without *Paction*, *a share in his Moveables*, of which he cannot *Defraud her by his Testament*; and this is called, *Jus Relictæ*; and if there be Children

Children, the Law has provided a Portion of the *Moveables* for them; which is therefore called their *Legitim*; and of which their Father cannot prejudge them by his *Teſtament* but there is no *Legitim* due by the *Mothers Death*; nor have Children who are *Foris Familiat*; that is to ſay, *who are Married, and have Renounced their Portion natural*; any *Legitim* due to them. Book 3 Tit. 8. Legitim.

This *Legitim* is alſo due only to the immediat Children, but not to *Grand Children.*

The Remander of the *Defuncts Moveables*, beſide what is due to the Relict, and Children, is called the *Deads part*; and upon that only he can diſpone. Deads part.

If

Book 3. Tit. 8. If a Man have no *Wife*, nor *Bairns*, all is the *Deads part*; and may be diſponed by him; If there be either *Wife*, or *Bairns*, and not both; then the *Defuncts Teſtament* receives a *Bipartite Diviſion*; but if there be both *Wife* and *Bairns*, then it receives a *Tripartite Diviſion.*

By the *Civil Law*, a *Teſtament* was null, if the *Heir* was not named; but with us a *Teſtament is Valid*, though the *Executor* be not named, who is the *Heir in Mobilibus*, and is called *Executor*; becauſe he *Executes and Performs the Defuncts will.*

Executor.

By Our *Law*, Relicts and Children dying after their Husbands and Fathers, but before Confirmation of their *Teſtaments* doe tranſmit their intereſt in the *Defuncts Moveables* to

to their neareſt of *Kinne*, *viz.* (the Children their *Legitime* or *Bairns part*, and the Relict her ſhare of the *Moveables*; the *Bairns* alſo as neareſt of *Kinne* have right to the whole *Deads part*; and the *Executor* not being neareſt of *Kinne* muſt count to them therefore retaining only a third of the *Defuncts part*, which is allowed to him for executing the *Teſtamont* * (if he be *Executor* nominate for an *Executor Dative* gets no allowance) and if there be an Legacie left to the *Executor Nominate* it is imputed in payment of his Third, but the *Deads part* whither failing to Children or to the other neareſt of Kinne, failing Childrs not tranſmitted without *Confirmation*, for both the *Relicts part* and *Childrens Legittime* aryſe by the Death of the *Father*

Book 3. Tit. 8.

*K. J. 6 Par. 22: Act 14

Book 3. Tit. 8.

ther or *Husband* and ſo needs no *Confirmation* or other *Conſtitution*; But the neareſt of *Kinnes* Right is by *Succeſſion*, and Conſequently requires *Confirmation* for eſtabliſhing it without which it cannot be tranſmitted to their *Executors*; for as an *Heir* in *Heritage* muſt be entered otherwiſe he cannot tranſmit his *Right*, ſo neither can an *Executor* without *Confirmation* tranſmit his *Right*, *Confirmation* being the only *Aditio Hæreditatis in mobilibus*; and as without *Confirmation* the neareſt of *Kinne* could not be lyable Paſſive in payment of the *Defuncts Debts*; ſo neither could he without it have *Right Active*. Children have right to their *Legitime*, except they be ſecluded therefrom either by their own *Renunciation*, or by accepting a *Proviſion* in full *Satisfaction*

tisfaction of all that they can crave as their portion, naturall or *Bairns* Part of Gear; And in either of theſe caſes they are *foris familiat*, and out of the *Familly*, and ſo have no ſhare with the *Bairns* remaining in the *Familly*; And therefore if Children get Bonds of Proviſion, from the *Father* in his *Leidge pouſtie*, they are not thereby Excluded from their *Legitime*, Nor are they obliged to colate theſe bonds of Proviſion, and to impute them as a part of their portion natural, but they have right to them as *Meer Creditors*, and and may likewiſe ſeek their *Legitime*; But if theſe Bonds of Proviſion were made to them upon *Death bed*, they cannot ſeek both the Proviſions of theſe Bonds and their *Legitime*; for the Father upon Book 3. Tit. 8.

Book 3. Tit. 8. on *Death bed* cannot prejudge the Relict, nor the reſt of his Children of their reſpective Shares, and Conſequently theſe Children, who are ſo provided upon Death bed, muſt Colate with the Relict and reſt of the Children *; but the *Heir* has no ſhare in the *Moveables*; except he *collate* and (*be content that the reſt of the Children ſhare equally with him, in all that he can ſucceed to as Heir*;) or in caſe there be but one *child*; for then that *child* is both *heir* and *Executor* without *Collation.*

*K. J. 6 par. 22 Act 17. Collation

An *Executor Nominate*, *is he who is named by the Defunct in his Teſtament*; And is therefore likewiſe called an *Executor Teſtamentar*; but if there be none named by the *Defunct*, then the *Commiſſar* will make an *Executor Dative*; and ordinarly

Exec. Nominate.

narly they prefer the neareſt of *Kinne*; but if the neareſt of *Kinne* being charged, will not *Confirme*, then they name their own *Procurator Fiſcal Executor*; and if thereafter, the neareſt of *Kinne* compear, they uſe to *Surrogat Him*, and this is called an *Executor Surrogate.* Book 3: Tit: 8.

Executor Creditor

A *Creditor* may confirm himſelf *Executor Creditor*; and ſo may purſue the *Defuncts Debitors*, and leaſt that *Creditors* ſhould wrong one another by *Nimious diligence*, *Our Law* has appointed, that all who ſhall confirm themſelves *Executors Creditors*, or ſhall do diligence againſt *Executors*, or *Intromitters* * within 6. Moneths one of another ſhall come in *Pari Paſſu.* Act of Sed: 28. Feb: 1662

Executors Creditors are only oblidged to confirm as much as may pay themſelves; and are for

Book 3. Tit. 8. for the ſame reaſon, *only lyable to doe diligence for what they did confirm.*

Becauſe *Moveables* may be eaſily concealed from *Creditors* or diſſipated, therefore the *Law* appoints, *that the Executor ſhall upon Oath give up Inventar, and find Caution to make theſe moveables forthcomming*; And then the *Commiſſar* confirms him; nor can he purſue, or diſpone as *Executor*, till he be confirmed: he is only lyable for the *Defuncts debt*. in as far as the goods confirmed will extend.

Executory being a meer Office, it accreſſes to the *Survivers*; if there be moe *Executors*, and in ſo far as the *Executors* have not execute the *Teſtament* in their own Lifetime; that is to ſay, *have not obtained Decreets for the goods belonging*

belonging to the Defunct; there will be place for a new *Executor*, for executing theſe; and they are called, *Executors quoad non executa*; or if the *Executor* ommit to give up any thing in the *Inventar*; or do not give up the ſaids *Moveables* at the *full rates*; there will be another *Executor Dative* appointed by the *Commiſſars*, who is called *an Executor Dative ad ommiſſa, vel male appretiata.* Book 3. Tit. 8.

The *Executor* onely has power of *Adminiſtration*; and the *Creditors* and *Legatars* can only purſue him; except where there is a *Special Legacy left of ſuch a particular thing*, or a ſum owing by ſuch a *Particular Perſon*; For then the ſpecial *Legatar* has the *Dominium* tranſmitted to him, and ſo he may himſelf purſue for his ſpecial *Legacy*; but the *Executor* muſt Special Legacy.

Book 3. Tit. 8. be ſtill called in the purſute, to the end it may be known, *whether the Debts exhauſt the ſpecial Legacies*; For, no *Legacy* can be payed, till the Debts be payed; and therefore, if all the *Legacies* cannot be payed, the *Legatars* ſuffers a *Proportional Defalcation for Payment thereof*; but if there be as much *Free Goods*, as will pay the ſpecial *Legacy*, there will be no *Defalcation.*

An *Executor* cannot diſpone, till he obtain a *Sentence*, but even the Sentence ſtates him not in the *abſolute Right of the Moveables*, otherwayes than that he may *Diſcharge* and *Aſſign* to the *Reſpective Perſons* having intereſt; For, if he were *Denounced Rebel*, the *Executory Goods*, even after ſentence, would not fall under his *Eſcheate*, nor would his *Execu-*

tors

tors, or his *Creditors* have Right thereto, in prejudice of the neareſt of Kin of the *Defunct*, to whom he was *Executor*. Book 3. Tit. 8.

If there be moe *Executors*, whom we call *Co-Executors*; one cannot purſue without the reſt, *for all of them repreſent* the *Defunct* only as one Perſon; but if any of the reſt will not *concurr*, they may be *excluded from their Office*, by a *Proceſs* before the *Commiſſars*; nor can an *Executor* for the ſame reaſon *diſcharge a debt* wholly, ſince the reſt have an equal ſhare in each Debt: but if the other *Executors* have got as much as their *ſhare* will extend to, a *diſcharge* even from one of the *Executors* will be ſufficient; nor are (for the ſame reaſon) *Co Executors* lyable for the *whole debt*, and ſo Co-Executors.

Book 3. Tit. 8.

cannot be *singlely pursued*, unless they have *intromitted* with as much; as may pay the debt pursued for.

Diligence of Executors.

An *Executor* is lyable to do Diligence for recovering the *Debts* due to the *Defunct*; and the diligence required upon his part, is a *sentence*, and *Registrated Horning against the defuncts debitors*; but if there be an universal, or special *Legator*, whereby the *Executor confirmed* has no advantage, then the *Executor* is not lyable in diligence, bnt only to *Assig* the *Creditors* that they themselves may pursue.

The *Executor* likewise cannot pay any Debt without *sentence*, least otherwayes he might *prefer one Creditor to another*; but yet the *Executor* may pay those *debts*, that are acknowledged in *Testament* without

without *Proceſs*, providing the ſame be payed before the *Creditors intent a perſute*; but theſe which we call priviledged Debts; may be payed at any time, even after *Proceſs* is intented at the inſtance of other *creditors*; becauſe they are preferred to all others, *viz Servants fies*, *Medicaments on death-bed*, *houſe meal*, *and Funeral-expenſes.* Book 3. Tit. 8. Privil. Debts

After the *Executors* have executed the whole *Teſtament*, they may get a *decreet of Exoneration* before the *Commiſſars*, againſt the *Creditors*, and all having Intereſt; wherein they may prove that all they got is *Exhauſted by Lawful Sentences*; but it is not neceſſar to have ſuch a *Decreet* when they are purſued before the *Lords*, for it is ſufficient when they are purſued there, to alledge, *that* Decreet of Exoneration.

Book 3. Tit. 8. *they are exhauſted by way of Exception.*

Vitious Intromiſſion.

If any Perſon intromit with the *Defuncts* moveables, without being confirmed, they are lyable to the *Defuncts whole debts*; whether they were related to him or no; though their Intromiſſion was very ſmall; and this was introduced to prevent the *fraudulent*, and *clandeſtine abſtracting of the Defuncts moveables, without inventary in prejudice of Creditors*; and therefore this Paſſive title is only introduced, in favours of *Creditors*; but of none others, ſuch as *Legatars Bairns, &c.* But if the Intromitter confirme, before any Action be intented, this purges the *Vitious intromiſſion*; and the Intromitter is only lyable for the *value of the goods intromitted with*; or if there be an

Executor

Executor confirmed, no Perſon can be purſued as *Vitious Intromitter*; for the Intromitter then is only lyable to the *Executor*; But the *Relict*, or the *Defuncts Children*, confirming within year and day after the *Defuncts* death, doth thereby purge the Vitioſity; though they confirm not till after Citation; nor will neceſſar Intromiſſion infer Vitioſity, and that is called, *neceſſar intromiſſion*, when either the *Husband* or the *Wife*, continue their poſſeſſion of one anothers Goods, after one anothers deceaſe, for preſervation; and that becauſe there is no other perſon to look after them; and this is for the *advantage of the Creditors*; ſince it hinders the Goods from periſhing. Book 3. Tit. 8.

Book 3. Tit. 8.

If there be moe *vitious Intromitters*, they are each lyable *in ſolidum*, if they be purſued in ſeveral *Actions*; and *pro virili*, if they be purſued together, but none of them get *Relief*, *for wrong in our Law has no warrant.*

Relief, &c.

The *Heir* is obliged to relieve the *Executor*, of all Heritable debts, and the *Executor* is bound to relieve the *Heir*, of all Moveable debts, as far as the *Inventar* will reach.

Title

TITLE IX.

Of laſt Heirs, and Baſtards.

WHilſt there is any alive, who can *prove even the remoteſt Contingencie of Blood to the Defunct*, they ſucceed to him; but if there be none, the *King* ſucceeds as laſt Heir; for *quod nullius eſt, eſt Domini Regis*; and ſo the *King* ſucceeds to the *Defunct*, as laſt Heir; both in Heritage and Moveables; and is preferred to all *Superiours*, and others whatſoever; for which end he makes a *Donatar*, who muſt obtain a *Declarator before the Lords of Seſſion*, againſt all who are ſuppoſed to have any *Relation*, whereupon a *Decreet* being

Ultimus Hæres.

Book 3 Tit. 9. being obtained *before the Lords*, declaring *that the King has right as laſt Heir*, the *Defunct* having dyed, without any Relation. This *Decreet* is equivalent to a ſervice; but if lands be taken by a man to himſelf, and his *Heirs Male* ſimply; the *King* or other Superiour will ſucceed as laſt *Heir*; if there be no *Heirs Male*, though there be *Heirs Female*; ſince the land was not provided to them; and therefore men ordinarly in their *tailzies adject* the Clauſe *which failzing* to their *Heirs whatſomeever.*

Becauſe the *King* ſucceeds here as Heir; therefore he is lyable to pay the Defuncts debts; but he is only lyable as farr as the Eſtate will extend; and therefore the *Creditors* may adjudge the Real Eſtate,

Eſtate, and ſerve themſelves *Executors Creditors* in the *Moveables.* Book 3. Tit. 9.

A *Baſtard* by Our *Law* has neither *Heirs* nor *Executors*; but yet he may diſpone upon either his *Heritage or Moveables* in his *leige pouſtie* though he cannot make a *Teſtament*; except he be *Legitimated* by a Letter under the *Great Seal*, (which extends not to Heritage) or have Children ſurviving him; for the *Baſtards* Children will alwayes ſeclude the *King.* Baſtardy.

The *King* in the caſe of *Baſtardy*, makes a *Donator*, who purſues Declarator, and is lyable to the debt; for in effect the *King* ſucceeds here, *quaſi ultimus hæres*, and *Creditors* uſe the ſame execution in this caſe, as in the other

and

Book 3: Tit: 9. and in both *ultimus hæres*; and *Baſtardy*, the Relict has ſtill her ſhare of the *Moveables*, as in other caſes.

Children procreated betwixt perſons divorced, and theſe with whom they have committed *Adultery* can not ſucceed to them *.

*K: J. 6. par. 16. Act 20.

The

THE INSTITUTIONS Of the LAWS of SCOTLAND

BOOK FOURTH.

TITLE I.

OF ACTIONS.

HAving finiſhed theſe two firſt parts of the *Law*, which treat of *Perſons and Rights*; We come now to treat of the *third part*, *viz. Actions*, whereby theſe *Perſons*, purſue thoſe *Rights*. Actions

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Book 4, Tit. 1. *what is due to us*; And it ſuffers very many Diviſions; the firſt whereof is, that ſome are Real, and ſome Perſonal; *A Perſonal Action*, is, *that whereby we only can purſue the perſon that is obliged to us*; as where I purſue a Man for payment of a ſum due by his Bond. *A Real Action is, that whereby a Man purſues his Right againſt all ſingular Succeſſors, as well as the perſon who was firſt obliged*; As for inſtance, if one have an *Infeftment of Annualrent*, he can not onely purſue the *Granter* for payment of the Money, by a *Perſonal Action*, but he can by a *Real Action*, called, *an Action for poinding of the ground*, purſue all ſingular Succeſſors, and poind the Tennents, and Intromitters with the Rent, for recovering of his Annualrent

Real & Perſonal Actions

rent out of the land, that ſtood affected with his *Infeftment of annualrent*. But by the Civil Law, a Perſonal Action, is, ſaid to be that which ariſes *from an Perſonal obligement* as a real Action, is *that which ariſes from a Real Right*, and is founded *in Dominium or Property*, and competent againſt any Poſſeſſor, or detainer of what is ours, called likewiſe *rei Vindicatio*. Book 4. Tit. 1.

Actions are alſo divided in ordinary Actions, and Actions reciſſory; For with us all Actions, are called, ordinary Actions; except Improbations, whereby we purſue *papers to be declared Falſe and Forged*; *or Reductions*, *whereby we purſue Rights to be declared null, and to be reduced.* Improbation and Reduction.

In *Improbations*, there are two Terms given to produce the Terms of Imp.

Book 4. Tit. 1.

the Write; becauſe the danger is great; And if the Writer and Witneſſes of, and in that Write be alive, *their teſtimonies are onely allowed as probation*; which is called, *the direct manner of Improbations*; But, if theſe be dead, the *Lords* try the Verity of the *Write by ſtrong preſumptions and conjectures*; which is called the *indirect manner of Improbation*: But becauſe in Reductions, the Write called for, is onely to be declared null, till it be produced; therefore, in theſe there is only *one term granted for producing*

Direct Manner of Imp.

Indirect Manner of Imp.

No Certification will be granted againſt any Writes, made by the Purſuer and his Predeceſſors and Authors; except he be ſerved Heir to theſe Predeceſſors, and produce a right made by theſe Authors: But *Certification* will be

be granted againſt any Rights made to the Defenders, or their Predeceſſors, to whom they may ſucceed *jure ſanguinis*, or to their Authors, or to any to whom theſe Authors may ſucceed *jure ſanguinis*; if any perſon be called to *repreſent theſe Authors.* Book 4. Tit. 1. Certif. in Imp.

The ordinary *Reductions* are *ex capite Inhibitionis*, *Whereby we purſue Rights to be declared null as granted after Inhibition is raiſed by us*; or *ex capite interdictionis*, if granted after *Interdictions* is raiſed by us; or *ex capite vivis & metus*, If the rights were extorted from us by force; or *ex capite fraudis*, If the Right were *elicit from us by circumvention*, in both which laſt the Purſuer muſt lybell the *Qualifications, or Circumſtances* from which the force or fraud are inferred; or *ex capite lecti*, if the

Book 4. Tit. 1. the deeds were done upon Death bed, in prejudice of an appearand Heir; or upon *K. J. 6 par. 23. Act 18. the *Act of Parliament*, 1621 *, if the deeds were done in *prejudice of prior Lawful Creditors, in favours of conjunct or confident perſon*; that is to ſay, *Relations, or Truſties, without an onerous cauſe, or to a Creditor*, though for an *onerous Cauſe*, in prejudice of another who had done prior diligence, that was habile to affect the ſubject diſponed; all which, and many others of that Nature are oppoſed to ordinary Actions; becauſe, they are extraordinary remedies invented by Law, for the preſervation of Mens Rights, and are called extraordinary; becauſe they are never competent, till other *ordinary remedies fail.*

Reprobatour.

Actions *of Reprobatour*, and Er-

Errour are in effect *Reductions*; and muſt have the concourſe of the *Kings Advocat*; In the firſt whereof, a party againſt whom witneſſes *have deponed unjuſtly*; craves, the Decreet *pronounced upon theſe Depoſitions to be reduced*; becauſe the Witneſſes have deponed Falſly, *circa initialia teſtimoniorum*; and condeſcends in his *Reaſons of Reduction*, upon the particulars wherein they have deponed falſly; and alſo concludes, *that the teſtimonies ſhould be reprobated.* Book 4. Tit. 1.

In the ſummonds of Error; the Purſuer craves, that a ſervice (*whereby the Defender is ſerved Heir to ſuch a man*) ought to be reduced; becauſe the Purſuer is a nearer Relation to the Defunct; than the perſon wrongouſly ſerved; upon which he condeſcends; and therefore concludes, *that the ſervice, and* Summonds of Error.

Book 4. Tit. 1. *and all following thereupon may be reduced*; And that it may be *found, that the Inqueſt who ſerved him heir have erred*; and this is the only ſummonds that is drawn in *Latine* with us,

Actions prejudicial. Some Actions, are called *preparatory*, or *prejudicial* actions, becauſe, *they muſt be diſcuſſed before other Actions are competent*; as for inſtance, If I purſue for a ſum, and the Defender raiſes an Improbation, alledging the write to be falſe; the trval of the falſhood, muſt be firſt diſcuſſed; and ſo is prejudicial to the *action of payment.*

Exhibition *Exhibitions* conclude, either meerly to exhibit the write, or the thing called for; and then it is only a *preparatory action*; ſuch as *exhibitions ad deliberandum*; or elſe they conclude delivery; and in all

Ex-

Exhibitions, the ordinar terms lybelled, are that the *Defender had, has, or has Fraudfully put away the papers or things craved to be exhibited*; and therefore, he is not obliged to exhibite, except he had them ſince the Citation, or fraudfully put them away, to elude a *future citation.* Book 4. Tit. 1.

Some Actions are called, *Actiones, bonæ fidei*; in which equitie is followed, as *Actions upon Mandates, Depoſitations, Emption, Location, &c.* In which the Judge conſiders what in equity is to be done by one party to another. And ſome Actions are *ſtricti juris*; in which the Judge is to follow the ſtrict prelcript of the *Contract* upon which the Action is raiſed, as in a *Declarator of Redemption*, wherein the *Purſuer craves, that it may be declared* Actiones Bonæ fidei. Actiones ſtricti Juris.

Book 4, Tit. 1. *declared that he has lawfully redeemed the lands*, that were Wadſeted; in which caſe the Judge muſt conſider the very preciſe terms of reverſion, and that the lands were redeemed conform to theſe terms; nor is *Equipollency Relevant* in theſe caſes.

Some Actions, are called *rei perſecutoriæ*, by which we purſue that *quod patrimonio noſtro abeſt*; which is commonly called, *damage and intereſt.*

Rei perſecutoriæ.

Some are called, *penal actions*; becauſe *we purſue not only for repetion, and real dammage, but for extraordinary dammages, and reparation by way of penalty* ſuch as are *Spulzies*; *Actions for violent Profits, &c.*

Penal.

Some Actions, are called *Arbitrary Actions, wherein the Judge is tyed to no particular Law;*

Arbitrary

Law; *but proceeds ex nobili officio*; that is to ſay, according to what he ſees juſtly and fit; as an Action for proving of the Tenor of an evident, wherein the Complainer lybels, that he had ſuch a paper, (of which he muſt lybel the *full tenor verbatim*,) *and that he loſt it by ſuch an accident*; *and therefore concludes*, *that the tenor may be proven by witneſſes*, *and adminicles in write*, which he muſt libel; For, no Tenor can be proven, without ſome adminicles in write: And generally, there being many things, with which the Law behooved to truſt the Diſcretion and Honeſty of the Judge, ſince all caſes could not be comprehended under known Laws; it therefore inveſted the Judge with this eminent power, which is called, *nobile* Book 4. Tit. 8.

Book 4. Tit. 1.

bile officium, in oppoſition to that *officium ordinarium*, & *mercenarium*, wherein he is obliged to follow the *will of the Contracters* preciſely, & *hoc officium mercenarium Judex nunquam impertit niſi rogatus.*

Declarators.

Some Actions, are called, *Declarators*; becauſe the Purſuer concludes in them, that ſome ſpecial thing ſhould be declared in his Favours; and ordinarly, whereever the *King*, or any other *Superiour* grants a gift, he to whom it is granted purſues a Declarator, *craving, it may be found and declared, that the Caſuality gifted to him, has faln in the Superiours hands, and that he has right thereto, by vertue of the gift*: And thus Declarators muſt be raiſed upon *Eſcheats, Marriages, Nonentries*, &c. only

onely there needs no *Declarator upon a gift* of Ward and of Forfaulture when paſt in *Parliament*; But if the Forefaulture be paſt before the Juſtices, the gift muſt be declared. And on gifts of *Eſcheat*, they ſometimes raiſe Actions, both of general & ſpecial Declarator in one ſummonds. In the General, the Purſuer concludes, that it ſhould be found and declared, that the *Rebel was lawfully denounced to the horn*; and that thereby his Eſcheat fell in the *Superiours* hands; And in the ſpecial, he concludes, *that the Tennents of the Rebels* lands, whoſe Eſcheat is faln, may pay him the Meals and Duties, by *vertue of his gift*, *and Decreet of general Declarator*. But though this laſt Action be called, *an Action of ſpecial Declarator*; it is in effect but

Book 4. Tit. 1. an *Action of Meals and Duties*: In other caſes alſo, where any thing is craved to be Found and Declared, as a right ariſing upon a ſpecial matter of Fact, for which no other Action can be found, that has a ſpecial name: *Lawiers* doe now cauſe raiſe *Actions of declarator*, or at leaſt, cauſe adject concluſions of Declarator to other Actions, ſuch as *Reductions*, *&c.* and theſe are the ſame with the *Actiones in factum*, mentioned in the *civil Law.*

Civil Actions

Some Actions are called *Civil*, *wherein Men proſecute their Civil Rights*; and ſome *Criminal*, *wherein Men proſecute crimes, ad vindictam publicam.*

For further clearing of Actions, and how they ought to be lybelled; I ſhall ſhortly explain

plain the Nature of a Summonds; and ſhall ſet down ſome of thoſe Actions which have ſpecial Names and Concluſions. Book 4. Tit. 1.

Nature of a Summonds.

The chief parts of a Summonds are the Purſuers Intereſt or Title; that is to ſay, *the right ſtanding in his perſon*, whereby he has good intereſt to purſue the Action he has intented.

Secundo, That all the perſons who ſhould be called as *Defenders*, be called in the Summonds; and ſince it is a relevant Exception againſt a Summonds, that *all perſons having Intereſt are not called*; Therefore it follows clearly, that for the more ſecurity it is fit to call all perſons, who may be concerned in that Proceſs.

Medium concludendi:

Tertio, The *medium concludendi*; that is to ſay, *the ground*

Book 4. Tit: 1: *whereupon the perſons called, are lyable to pay and perform what is craved.*

Quarto, After all this is narrated, the King in the Summonds, ſays, *Our will is, &c.* that ye *cite ſuch and ſuch perſons, &c.* which is called the *Will of the Summonds*, and which Will of the Summonds does comprehend a Command to the *Meſſenger*, to cite the *Defenders*; and expreſſes the Number of dayes, upon which they are to be cited, and the Places to which they are to be cited; and before whom they ſhould compear: *As alſo*, the *Concluſion* craved by the Purſuer, each of which Summonds, almoſt has its own ſpecial *Stile* and *Terms*; and by Act of Parliament *Writers* are commanded not to alter the *Ancient Stile.* *

Will of the Summonds.

Concluſion.

*K. J. 6 Par. 10. Act. 13.

It is obſervable, that though the

the *Matter of fact* be ordinarily narrated before the will of the Summonds; yet *Summonſes of Reduction, Improbation, Spulzie,* and *Declarators of Nonentrie*, begin, at, *Our Will is, &c.* And then goes on to the Intereſt of the Purſuer, *&c.* Book 4: Tit: 1:

In a *Summonds* of *Tranſumpt*, the Purſuer (who in the Summonds is alwayes called the *Complainer*) lybells, *that he has Right to the Lands whereof he craves the papers to be tranſumed*; and that therefore it is neceſſar to him to have Doubles, and tranſumpts of the Rights; and this is the purſuers *Intereſt*; and that the *Defender* has theſe Rights, or is obliged to procure him *Tranſumpts*; and therefore concludes, that the Defender ſhould be obliged to *exhibite, and produce them*, to be *judicially Trunſumed*; and the Tranſumpts.

Book 4. Tit:. 1.

authentick Tranſumpts to be declared as ſufficient for the ſecurity of the Purſuer in the ſaids lands as the *original writes* themſelves.

In a *Summonds of Multiple poinding*, the Complainer having narrated, that he is *troubled by ſuch and ſuch perſons*, who do each of them pretend Right to a Sum, in which he is lyable; he therefore concludes againſt all of them, to *compear* to *hear* and *ſee the ſame tryed*; and the *Party* who *ſhall be found to have beſt Right* to be preferred; and and the other Party to be *diſcharged from troubling and moleſting him in all time coming.*

Multiple poinding.

In a *Summonds of transferring*, the Purſuer lybels that there was a depending Proceſs, at the inſtance of his Predeceſſor, whom he repreſents againſt the Defunct whom the Debitor repreſents; which Proceſs muſt be narrated *verbatim*:

And if the purſuers predeceſſor be dead, craves that the Proceſs be transferred *active* in his perſon as repreſenting the Defunct. And when the Defender is dead, the ſame is tranſferred againſt his Repreſentatives *paſſive*. The Concluſion of transferrences are that ſuch *Actione* may be competent to the Purſuer as Heir to the Defunct, againſt the Repreſentatives of the Defender, as was competent to the purſuers predeceſſor, and that the ſaid Action may go on, and be continued in the ſame manner as it would have done againſt the defunct, whom the Defender repreſents

Transferrences are priviledged Actions coming in upon ſix dayes.

If any perſon ſubſcriver of a Bond or a Contract be dead,

Book 4. Tit. 1. the *Procuratorie* conſenting to the Regiſtration expyres; and therefore the Write cannot be regiſtrated, otherwiſe than by raiſing a Summonds of Regiſtration againſt the Repreſentatives of the Granter, upon the paſſive Titles, in which the whole Tenor of the write craved to be regiſtrated is ſet down *verbatim*; and then it is concluded that the ſaid Write ſhould *be inſert* and regiſtrated in the Books of Council and Seſſion, for Conſervation; and that Execution ſhould be direct thereupon, in manner mentioned in the ſaid Write; And that the ſaid Repreſentatives ſhould be lyable in payment; But this Action is ordinarily ſupplyed by an ordinary Action for payment.

Summonds of Regiſtration

In a *Summonds of prevento*; The Complainer narrates, that

that he having *raiſed letters of horning*, the ſame were *Suſpended upon moſt frivolous Reaſons; to a very long day*; and therefore concludes, that the *Defender ſhould bring with him the ſaid Suſpenſion, the blank day of blank, prevento termino: to hear and ſee, the ſame called, reaſoned and diſcuſſed, with Certification, that if he fail, the Lords will cauſe call the Suſpenſion, upon a copie, and admit Proteſtation therein, and ordain the letters to be put in furder execution.* Book 4. Tit. 1. Prevento.

It an *Advocation* be raiſed to too long a day *of compearance*, there may be likewiſe a *Summonds of Prevento* raiſed thereof.

In a *Summonds of Contravention of Laborrows*; the purſuer lybells, that *A. B. became ſurty*,

Book 4. Tit. 1. and *Laborrows* for *C. D.* that the Complainers, *Wife, Bairns, Men, Tennents, and Servants, ſhould be harmeleſſe, and skaithleſſe in their Bodies, and lands, &c.* And then ſubſumes upon the prejudice done, notwithſtanding of the ſaid caution: And therefore concludes, that both the *Principal and Cautioner*, ſhould be decerned to have contraveened the ſaid *Act of Caution*, in manner foreſaid; and therethrow, that they *conjunctly and ſeverally have incurred the foreſaid pain, the one half to the King and his Theſaurer, and the other half to the Complainer, as Party grieved.*

Contra: of Laborrows.

*K. J. 6. p. 6. act 77. p: 13. act 170. p. 7. act 117.

In a *Declarator of Property*, the Complainer narrates his Right to the Lands, and how long and after what manner, he and his Authors have been by

by Themſelves, their Tennents, and others having Right from them, in the peaceable poſſeſſion of the ſaids Lands; untill of late that he is moleſted, and troubled by the Defender; and therefore concludes that it ſhould be found and declared, that he has the ſole good, and undoubted Right, and intereſt in and to the ſaids Lands; and that therefore the ſaid Defender, and his *Tennents, and Servants and others, of their cauſing, and commanding, ſhould be decerned, not to trouble, nor moleſt them for the future, in their peaceable poſſeſſion, bruiking, and joyſing thereof.*

Book 4. Tit. 1.

Declar: of Property.

If the Complainer deſigns only to maintain his poſſeſſion; without bringing his propertie in controverſie he raiſes a *Sum-*

Book 4: Tit: 1. a *Summonds of Moleſtation*; In which he only concludes, that *they ſhould deſiſt, and ceaſe from troubling and moleſting him in the peaceable poſſeſſion of his lands.*

Summonds of Moleſtation.

Poynding of the ground.

In a ſummonds *for poinding the ground*, the Purſuer narrates, that he ſtands infeft, and ſeaſed in an annualrent of to be uplifted, out of the lands of and therefore concludes againſt the Tennents of theſe lands; and the Heritor for his intereſt, to *hear and ſee Letters directed to Meſſengers at Armes, Sherriff in that part, to Fence, Arreſt, Appriſe, Compel, Poind, and Diſtrinzie the readieſt Goods and Gear, that are preſently upon the lands; and yearly and termly in time coming, during the not redemption of the annualrent.*

In

In a ſummons *of Spulzie*, the *King* commands *Meſſengers*, *&c:* (which is the ſtile of all Summonſes, which begin with, *Our Will is*, to *Summond*, *Warne*, and *Charge* the Defender, to compear and anſwer at the inſtance of the Purſuer againſt whom the *ſpulzie* after ſpecified was committed; that is to ſay, the *Defenders for their Wrongous, Violent, and Maſterful coming by themſelves, and their ſervants, complices, and others in their name; of their cauſing, ſending, hounding out, command, reſet, aſſiſtance, and ratihabition, to the lands of upon the day of and for their Wrongous, Violent, and Maſterful ſpoilziation of the Goods* (to be condeſcended on) and then concludes, *that they ſhould pay the prices extending to blank, and the profits, of*

Book 4. Tit. 1.

Spulzie

Book 4. Tit. 1.

that the Complainer might have made of the ſaids Goods daily ſince the ſaid ſpulziation, extending to &c.

In a Summons of *wakning*, the Complainer after narrating that he had raiſed ſuch a Summonds, which he had ſuffered to lye over and ſleep for a year; (for their needs no *wakning* if there was any *Judicial Act*, or Minute upon the Summonds within the year) and therefore concludes againſt all the Perſons cited in the firſt Summonds, to hear and ſee the *foreſaid Action called, wakned, and begun, where it laſt left, inſiſted into, and Juſtice Adminiſtrated therein, till the final deciſion of the cauſe.*

Wakning.

A *Furthcoming* is that Action, wherein the Arreſter lybells, that he having raiſed

letters

letters of Arreſtment, he cauſed, *Meſſenger* lawfully fence and arreſt all debts owing by the *Defender* to his Debitor, to remain under Arreſtment; and to be made furthcoming to him; and therefore concludes, that the *Defender* ſhould be *decerned to make furthcoming payment, and delivery to the ſaid Complainer, of the ſum of adebted, reſtand, owand be him to the ſaid Debitor.* Book 4. Tit. 1 Furthcoming

If notwithſtanding of the *Arreſtment*, the Debitor pay his own Creditor; he will be lyable to the Arreſter, and will be forced to pay him what he was reſting to his own Creditor, and likewiſe he may be purſued *for breaking of Arreſtment*, wherein after the Arreſtment, and payment is narrated Breaking of Arreſtment

Book 4. Tit. 1. narrated, the Purſuer concludes, *that the Defender ſhould be decerned to have broken the Arreſtment then ſtanding; and not lawfully and duely looſed; and* *K. J. 6. par. 7. Act 118 *therefore to be puniſhed in his perſon, and goods, conform to the Laws of the Realm, in example of others.*

Though the *Accummlation of ſeveral Actions into one Lybel*, was not allowed by the *Civil Law*; yet it is allowed by Ours, in which we may not only purſue ſeveral perſons, for ſeveral debts in one Lybel, which we call by a general name, *an Action againſt Debitors*; But we may likewiſe accumulate ſeveral Concluſions, againſt one and the ſame perſon; though they be of different Natures; as Reductions, Improbations, and Declarators of Property, and Actions of General and Special Declarator; in all which it is a general

Accumulation of Actions.

general Rule, *quot articuli tot libelli.* Book 4. Tit. 1.

But when many Actions are competent, for one and the ſame thing, as if a Meſſenger be deforced, we may purſue the Deforcer Criminally; (which will infer *confiſcation of moveables, or civilly for payment of our debt*; and the purſuing of the one does not extinguiſh, or conſum the other; and either the Criminal or Civll Action may be firſt purſued; and in the concourſe of all Actions; if the actions which concurr have different Concluſions, as in the foreſaid inſtance, where the Criminal Action of Deforcement concludes Confiſcation, and the Civil Action only payment. Though the Defender be aſſolzied in the Criminal Proceſs, yet he may be purſued

Concurſus actionum.

Deforcement

Book 4. Tit. 2. sued Civillie, and the Deforcement referred to his Oath.

TITLE II.

OF PROBATION.

FOR understanding the *matter of Probation*; it is fit to know, that all *Probation* is either by Write, by Oath, or by Witnesses.

Probation

Probation by Write, has been formerly explained in the Title concerning *Obligations by Write.*

By Write

Probation by Oath, is when either the Partie or Judge *referres any thing to the oath of the contrare party, but regularly* no Mans Right can be taken away by Oath; except h

By oath

wh

who has the Right, referr the ſame to the Adverſaries Oath; but when there is a former Probation already adduced, the Judge ſometimes gives an *Oath of ſupplement*, which is ſo called, becauſe it is given to *ſupplie the Probation* already led, when it is Defective or unclear. Book 4. Tit. 2.

Oath of ſupplement.

An Oath of Calumny, is that whereby either the Purſuer, or Defender is obliged to ſwear that the *Purſute, Defence, Reply, &c.* are not *groundleſs*, and unjuſt and this may be craved by either Party, at any time during the dependence; and if it be refuſed, the purſuer will have no further Action nor the Defender will not be allowed *to inſiſt any further in the Defence, Duply, &c.* whereon his *Oath of Calumny* is craved,

Oath of Calumny.

K. J. 1. Par. 9. Act 125

An *Oath in Litem, is that which*

Book 4. Tit. 1. *which Law allows the Judge to deferr to him who is injured; for proving the quantities of the thing wherein he is injured; V. G.* If I

Oath in Litem. purſue *Titius*, for having *brok up my Trunk*; and I having proved *that he did break it up*, the Judge will refer to my Oath, what I had in the Trunk; and this is allowed both *in odium* of him who commits the *Injury*, and leaſt the perſon *unjuſtly injured* ſhould loſe his Right for want of *Probation.*

A qualified Oath *A qualified Oath*, is, *that whereby he to whoſe Oath any thing is referred, depones, not ſimply, but circumſtantially*; which we call *to depone with a quality*; *V. G.* If I purſue *Titius* for payment of 100. *Lib.* which *he promiſed to pay, who compears*, and *depones, that*, The Promiſe was conditional, and did depend upon ſome thing to be done or performed

formed by the purſuer, as that intuitue of the promiſe, the purſuer was to make over ſome Right to him, or diſcharge ſome Obligation or Right ſtanding in his Perſon: and thoſe qualified Oaths generally are admitted; if the quality be intrinſick, that is to ſay, *neceſſarly imployed in the nature of the thing, or are a part of the Promiſe*; As in the foreſaid Inſtances. Book 4. Tit. 2.

But if the quality be extrinſick, it in effect reſolves in a defence, and ſo muſt be proven otherwayes, than *by the qualified Oath*; as if a *debt be referred to a parties Oath*, who depones, *that he acknowledges the debt, but that the Purſuer is reſting to the deponent, the equivalent ſum, with which he would compence the Sum purſued for*; this will not be admitted as a quality

Book 4. Tit. 2.

lity, but is in effect a *Defence* which must be proven, *otherwayes than by his Oath.*

proba. tion by witnes- ſes.

Probations by Witneſſes, having been allowed in all *Caſes of old*, untill the falſeneſs of men forced our Law givers, to allow nothing above 100. *lib.* to be proveu without Write, or Oath, and Promiſes, to be only proven by Oath; this probation by Witnels is therefore called, *probatio prout de jure*; and it is fit to know, that none within Degrees *defendant*; that is to ſay, who are *Couſin germans*, or *nearer Relations* can be Witneſſes; nor *Women*, nor *Tennents*, *who have not Tacks*, nor *perſons declared infamous*, nor *domeſtick Servants*; nor ſuch as *may gain or loſe by the Cauſe*; nor ſuch as *have given partial Counſel*; that is to ſay, *Advice to raiſe or carry on the purſute*; nor ſuch as *have told*

Inha- bile witnes- ſes.

told what they will depon, which we call *prodere teſtimonium*; nor ſuch as *compear to depone without being cited*; whom the Law calls, *Teſtes ultronios*, and rejects them, *becauſe of their ſuſpected forewardneſs*; All others except theſe may depone, and are called *habile witneſſes*: And if *habile witneſſes* refuſe to come when they are cited, there will be firſt *Horning*, and then *Caption directed againſt them*, which are called firſt and ſecond diligences, but their *Eſcheates* will not fall upon that Horning. Book 4. Tit. 2.

Preſumptions, are a kind of probation, and a *preſumption is defynded to be a ſtrong ground or argument, whereby a Judge has reaſon to think, or be convinced that ſuch a thing is true*; and they are divided into *preſumptiones juris*, which though they be Preſumptio

Book 4: Tit 2. be ſtrong, yet may be taken off by a contrary Probation; as if a man threaten to poyſon another, if the perſon was thereafter poyſoned, it is preſumable tha he was poyſoned by the Threatner; and *preſumptiones juris & de jure; ubi lex conſtituit ſuper preſumpto*; and thus the Law preſumes, that an *ultronius* witneſs, who offers himſelf, is *partial*; and therefore Statutes upon that preſumption, that he ſhall not be received; *and againſt theſe preſumptions, no probation can be admitted.*

Title

TITLE III.

Of Sentences and their Execution.

AFTER a *Decreet* is extracted, the *Obtainer thereof raiſes letters of horning thereon*; whereby the party decerned is charged to pay or fulfill the will of the *Decreet*, under the pain of Rebellion; and this Decreet can only be quarrelled by Reduction, or *Suſpenſion*, in both which the reaſons whereupon it is quarrelled are ſet down; nor can a *Decreet of the Lords*, be taken away without Reduction; and if there has been a Debate in the firſt inſtance, (for ſo we call the Action before the Decreet; as

Book 4. Tit. 3.

as we call Reduction and Suſpenſion the ſecond Inſtance) then nothing that was competent to have been proponed before the Decreet, will be admitted, but will be repelled as *competent and ommitted*; for elſe there ſhould be no end of *Debate*; but yet if any thing have newly emerged; or has newly come to the Parties knowledge, theſe are and muſt be received, if he depone, that *he knew not the ſame formerly*.

Suſpenſion.

The ordinar effect of a *Suſpenſion is to ſtop the Execution of Sentences for a time*; And it is a *Summonds*, wherein the Party alledged injured by a Decreet, does cite the Partie who has obtained the Decreet *before the Lords*, (for no *inferiour Court can ſuſpend*,) to anſwer to the Reaſons offered by him, for Suſpending

Suſpending Executions upon that *Decreet*: which Summonds proceeds upon a Bill, wherein the *Reaſons* are *repreſented to the Lords*; for though ſometimes, *the Lords ordains the Reaſons to be debated upon the Bill*; yet ordinarly they ordain Letters of Suſpenſion to be raiſed: If the Decreets be *in foro*, then the Suſpenſion muſt paſs by the whole Lords in time of *Seſſion*, and by three Lords in time of *Vaccance*; but other Decreets may be ſuſpended by any one Lord. Book 4. Tit. 3.

There are other reaſons allowed to be inſiſted on beſide theſe in the Bill, and theſe are called *eiked reaſons*, and a Man may ſuſpend upon new reaſons, as oft as he pleaſes for competent and omitted is not received againſt *Suſpenſions*. But if the Reaſon of

Book 4. Tit 3. Suſpenſion be founded on Compenſation, the ſame muſt be proponed in the firſt Inſtance, and before the Decreet be extracted*, otherwiſe it will be repelled as competent and cmmitted..

*[K. J. 6. Par. 12. Act 141

If the *Suſpenſion* be called, diſcuſt, and the Letters found orderly proceeded, that is ordained to be put to further execution: Then Letters of Caption may be raiſed; whereby all the *Inferiour Judges* and *Magiſtrates*, are ordained to *to concurr with the Meſſenger, in apprehending the Rebel, and putting him in priſon*; which if they refuſe: or if the Priſoner thereafter eſcape out of their Priſon *they are lyable to pay the Debt*; by a *Subſidiarie Action.*

Decreets are executed likewayes by *Poinding*, and *Arreſtment*, upon the *Warrand in the Letters*

Letters of Horning, which are fully treated in their proper places: *vide ſupra*, *Tit. Poinding*, and *Arreſtment. Tit. 6. Book* 3. Book 4. Tit. 3.

As to *Execution of immovable goods*, which is by *Compriſing* and *Adjudication*; the ſame is formerly treated, *Book* 2. *Tit.* 12.

If the Decreet be to *remove from Lands*, then the Party decerned to remove, being denounced Rebel, for not removing; the *Sherriff* or *Judge ordinar*, is charged to eject, * *who comes to the Land, and puts out the fire*, or *caſts out ſome of the Pleniſhing*; But if a man continue to poſſeſs *in ſpight of all Law* after he is legally ejected, the *Privy Council* will give *Letters of Fire and Sword, to the party injured*; commiſſionating the *Sherriff*, and others whom he Letters of Ejection. Letter of Fire and Sword

Book 4. Tit. 3. will name, to *diſpoſſeſs him by the Sword, to raiſe Fire, and uſe all other ſeverities*, for which the Commiſſion does *indemnifie them.*

If ſuch as have *debateable Rights*, chooſe rather an *amicable*, than a *Judicial deciſion*, they ſubſcrive a *Submiſſion to Arbiters*, and if they pleaſe, to an overſman, and another *Blank* on the back of the *Submiſſion*; wherein they may fill in their *Decreet Arbitral*: And though it be free to theſe *Arbiters* to accept; yet if they once accept, the *Lords will grant Letters of Horning to force them to decide.*

Decreets Arbitral,

Though theſe *Arbiters* are not tyed to the ſtrict *ſolemnities of Law*, yet they muſt obſerve *material Juſtice*; and therefore, they muſt *advertiſe Parties, that they may give in claims*

claimes (for a *claime* to *Arbiters* is in place of *lybels to Judges* ;) and muſt allow Terms to prove ; And though Equity is to them a Rule, as Law is to other Judges ; yet if either Party be enormly leſed, the Lords will ſuſpend and reduce their Decreets. If the Submiſſion bear no ſpecial day, betwixt and which they are tyed to decide, they muſt dedecide within a year of the Submiſſion ; and if Witneſſes will not voluntarly appear before them, the *Lords* will upon a Bill, grant Letters of Horning to force them to appear ; as they will againſt the Arbiters themſelves ; if they refuſe or delay to decide, and to give forth their Decreet Arbitral. Book 4. Tit. 3.

Another ordinary way now uſed, is that the one party

Book 4. Tit. 4. grants a blank Band, and the other a blank Diſcharge, to be filled up by the Arbiters, without any ſubmiſſion.

TITLE. IV.
OF CRIMES.

Crimes

CRIMES are either Private, where the injury is committed againſt private Perſons; or Publick, where it is committed immediately againſt the *Common-wealth.*

Delicta

Private Crimes, called alſo *delicta*, in the *Civil Law*, oblige the Committers to repair the Dammage, and Intereſt of the private Party.

Crimes are in *Scotland* either puniſhed Capitally, by death; or Pecunially, by a certain fine; or Arbitrarly at the diſcretion of the Judge.

Capitale

Capitale Crimes are

Treaſon, which is puniſhed *by forefaulture of life, lands, and goods.* Treaſon. *K. J. 2 par. 6.

It is Treaſon in any Man, to Plot, contrive, or intend death, or deſtruction to the Kings Majeſty; or to lay any reſtraint upon his Royal Perſon; or to deprive, depoſe, or ſuſpend him *, *or to endeavour the alteration or diverſion of the Succeſſion* *; *to Levy warr againſt the King, or any Commiſſionated by him; or to intyſe others to invade him* *, *to make Treaties, or Leagues with Forraign Princes, or amongſt themſelves without his conſent* *. *To riſe in fear of warr againſt the King; to raiſe a frey in his hoaſt* * *to Aſſaile Caſtles where he reſides* *; *to impugne the Authority of the three Eſtates; to decline the Kings Authority, not to come* Act 24 K. C. 2. par. 1. Seſſ. 2. Act 12 *K. C. 2 par. 3. act 2. *Par. 1 Seſſ. 2. act 2. *K. C. 2 par. 1. ſeſ. 1. act 3 & 5 *K. J. 2 par. 12. act 54. K. J. 2 par. 6. act 24. *K. J. 6 par. 8. act 129. & 130

Book 4. Tit. 4. *out to the Kings Hoaſt*; or to deſert it *; to maintain or reſet *Treatours* *; to conceal *Treaſon*; *to counterfite the Kings coyne*; and to raiſe *wilful fire* *; all which are *Species of high Treaſon.*

*K. J. 1 par. 1. act 4. K. J. 2. p. 6. act 24.

K. J 2. p. 2. act 28. * act 97 par. 7. *K. J. 5 par. 3. Act 8. * Stat. Treaſon. *K. J. 6 par. 11. Act 50. * Ibid. Act 51 *K. J. 6 p. 12. act 146.

We have a kind of *Treaſon* in *Scotland*, which we call * *Statutory Treaſon*; becauſe it is meerly introduced by *Statute*, and not by Common Law; *viz. Theft in landed men* *; becauſe of the danger of that kind of *theft*; *murder under truſt* *; as if one man ſhould kill another, when he invites him to his houſe; or a *Tutor* ſhould kill his *Pupill*, which becauſe of the eaſineſs and atrocioufneſs of the Crime is made Treaſon) *The fireing of Coal heughs* *, *aſſaſſination* *; *and the purſueing another for Treaſon without being able to prove*

it

it *. *All Jeſuits, Seminary Prieſts, and traffecking Papiſts* *; *and all thieves, who take bonds from leal and honeſt men*; for re-entering when they pleaſe: All who purchaſe *benefices at Rome*; are guilty of *Treaſon* ||.

Book 4. Tit. 1.
*K.C. 2 par. 3. Act. 13.
*K. J. 6 par. 11. Act 49.
*K. J. 6 par. 12. act 120
*K J. 5 par. 7. act 125.
K. J. 6. par. 6. Act 69.

No Crime can be purſued againſt a Man or his Heirs, after his death; except that *Treaſon* which is committed againſt the *Kings Perſon*, or *Common-wealth*.

A *Traitor* being forfaulted, not only all the Lands he holds of the *King*, but all the Lands he holds of any other Superiour fall to the *King*; becauſe the Crime is Committed againſt him. But becaule the *King* cannot hold Lands of any other Superiour; Therefore he does by a Letter of Preſentation under the

Quarter

Book 4. Tit. 4. *Quarter Seal*, preſent a Donatar to the Superiour, who is to be Vaſſal to the Superiour in place of the perſon forefaulted: And this method of preſentation the *King* uſes alſo in the caſes of Baſtardy and *ultimus hæres*.

Not only the Lands diſponed to the perſon forefaulted, but all the Lands diſponed to ſub-vaſſals, who are not confirmed fall to the *King*; for the Lands return to the *King*, in the ſame condition they were diſponed by his Majeſty, or his Predeceſſors, without being burdened with any Right, except theſe to which he has conſented; Nor is the *King* obliged to acknowledge tackes, though made and cloathed with poſſeſſion before committing of the Crime, except the tack be

be ſet for a ſuitable tack duty. The *King* is obliged to pay no debt, though contracted for Onerous cauſes, before the committing of the Crime; Except the Creditor have a real ſecurity therefore confirmed before the Crime was committed. Book 4. Tit. 4.

The other *Capital crimes* are *Blaſphemie*, *Mans ſlaughter*, *or Homicide*; for all *Homicide is Capital with us:* except it be *Caſual* *, *or Homicide* in ſelf *defence*. *K.C.2 par. 1. Seſſ. 1. Act 22.

* *Theft* is puniſhable by death; but we call ſmall *theft pickery*, and it is only puniſhable *arbitrarly* *. *K.J.1. par. 13. Act 137 & 14. *K. J. 3 par. 7. Act 60.

Notour Adultery, that is to ſay, where there are Children of the Marriage: or where the adulterers converſe openly at bed and board; or being diſcharged by the Church to converſe, do continue to converſe

Book 4. Tit. 4. *converse is punishable by* * *death; but simple adultery is only punishable Arbitrarly. Incest* *, *Buggery, Duels* †, *the invading of any of his Majesties Officers, for doing His Majesties Service* * ; *Forgery* †, *Witchcraft, and the consulters of Witches* *, *Sorners*; that is to say, *such as Masterfully take Meat and Drink from the Kings People without Payment* † : *All wilfull hearers of Mass* *, *and conceallers of the same*; *Mutilation* †, which is the *disabling of a Member*, (though *de praxi*; this be ordinarly punished with an *Arbitrary punishment* : Or the Authours of *infamous Lybels, Seditious Speeches, tending to Sedition; the strickers of any Judge in Judgement*; *Mixers of Wine* *, *and committers of Hame-sucken, by which*

*Q. M. par. 9. Act 74.
K. J. 6. par. 6. act 105.
†K. J. 6. p. 1. act 14.
*K. J. 6. p. 16. act 12.
†K. J. 6. p. 16. act 4.
*K. J. 5. p. 6. act 8.
†Q. M. act 22. p. 7.
†Q. M. p 9. act 73.
†K. J. 1. p. 1.

act 5. & 7. * K. J. 3. p. 10. act 71. * K. J. 6. p. 14. act 193. †K. J. 6. p. 6. act 76. * K. J. 3. p. 12. act. 89.

we

we underſtand the aſſaulting or beating any Man in his houſe. Book 4. Tit. 4.

The *Crimes* to be *pecunially puniſhed* are the *ſlayers of Red-Fiſh* * ; *killers of Daes, Deer, Roes* *, *deſtroyers of Bee-hyves, Fruit-trees, Green-wood* ; *kindlers of Mure-burn* ; except in the Moneth of *March* ; *ſteeping of Green-Lint in running Waters* ; *or Loches* ; ſuch as are guilty of *abominable Oaths* ; and *Furnication.* *K. J. 1. p. 1. act 19. *K. J. 1. p. 1. act 1. and act 16. p. 14. act. 10. *K. J. 2. p. 14. act 76.

Crimes to be Arbitrarly puniſhed at the diſcretion of the Judge, are negligence in the *Kings Judges and Officers* *, *and ſuch as unjuſtly murmure againſt them* † ; *breakers of the Kings Protection* * ; *the bringing home of Erroneous books* † ; *and the troublers of Church-Men* ; *Crafts-Men who wronguouſly refuſe to fulfil the work which they have taken in hand* * ; *Verbal Injuries, and Scandals, againſt private Parties.* †K. J. 5. p. 7. act 104. *K. J. 1. p. 11. act 134. †K. J. 6. p. 7. act 106. *K. J. 1. p. 5. act 80. †K. J. 5. p. 7. act 111.

It

Book 4. Tit. 4.

It is fit to know that no puniſhment left Arbitrary by the Law, to the Diſcretion of the Judge, can be by him extended to death; and that whereever the Law appoints Death to be inflicted, the Offenders moveables fall to the King; though the Law does not expreſs the ſame; and though the Sentence expreſs not the Confiſcation.

There are other *Crimes*, whereof the puniſhment is not reduceable to any of theſe kinds; and thus Perjury, and *Bigamy*, (which is a kind of Perjury; Becauſe, a Man who *marries two Wives breakes his Matrimonial oath*,) are puniſhable by *confiſcation* * *of all the Offenders Moveables Goods*, *Impriſonment*, *and Infamy*.

*Queen Mary p. 5. Act 19.

Deforcers of Meſſengers, and *breakers of Arreſtment*, are puniſhable

shable by confiscation of all their Moveables *; *Foreſtallers of Mercats* *, by buving things before they be presented to the Mercat; or before the Mercat be proclaimed, are punishable by imprisonment, and confiscation of what is bought.

Oeker, or *Usury* *, which is the taking more than the Annualrent allowed; or the taking Annualrent before the term of payment; is punished by loss of the principal Sum, for the Debitor is to be free from the Obligation, and the Write being *reduced*, *the sum belongs to His Majesty.*

Stellionat, or the making of double Rights, is punished by Infamy *; and their persons are at the Kings will.

The *Keepers of Victual to a Dearth*, are punishable as **Oekerers*; and by the *Civil Law*, *per leg.*

Book 4, Tit. 4.
*K J.6, p. 7. Act 118 p. 12. Act 150
*Ibid. Act 48.
*K.J.6. p. 11. act 52.
p, 14. act 222.
p. 15. act 257.
*K.J.5. p. 7. act 15. K.J. 6. p. 12. act 141.
*K.J.2. p. 6. act 22, K. J.6. p: 6: act 93.

Book 4. Tit. 4. *leg. Jul. de Annona.* Bribing of Judges is puniſhable by Infamy and Deprivation. *Plagium*, or the *ſtealing of Men*, is a particular Crime by the *Civil Law*; but is a ſpecies of Theft with us. And *Theftboot*, which is the ſaving a Thief, by fyning with him, is puniſhable as *theft* *. *Baratrie*, or the obtaining Benefices from *Rome*, is puniſhable by * Baniſhment and Infamy. *Ambitus*, or the obtaining Offices by unjuſt Means, is not puniſhable under Monarchie.

*K:J:6 p: 13: act 137:

*K:J:6: p: 1: act 2: p: 6: act 72:

By our Law when the Purſuer raiſes a *Criminal Summonds*, he muſt find caution to report the *Criminal Letters*, *indorſt*, and *execute*, and the Cautioner muſt either enact himſelf in the books of *Adjournal*, (for ſo we call the Regiſters of the *Juſtitiary*) if he be preſent, or he muſt

muſt ſend a Band to be Regiſtrate there, if he be abſent, under the pains contained in the Act of Parliament*; And the Defender is by the Letters commanded to find caution in the ſaids books, within ſix dayes after the ſaids Letters are execute againſt him; which finding of Caution, he muſt intimate to the Meſſenger, who cites him, elſe that Meſſenger may denounce him for not finding Caution. Book 4. Tit. 4. *K. J. 5. par. 4. Act 34.

The Defender in all Crimes is allowed to have *Letters of Exculpation*, for leading witneſſes for proving of his own innocency, which he muſt raiſe and execute againſt the day of compearance, to which he himſelf is cited, for all dyets in Criminal Courts are preremptor. And there are no Dyets allowed for further Probation, either

Book 4. Tit. 4. either to Purſuer or Defender.

All Probation in Criminal Cauſes muſt be very convincing and clear, becauſe of the ſeverity of the concluſion: But yet ſometimes witneſſes, otherwiſe *inhabile* are allowed, becauſe of the danger of the Common-Wealth, as in Treaſon, or becauſe the Crime cannot be otherwiſe proven, as in *Hameſucken.*

The Juſtices are the only Judges to all points of Relevancies, and even to the objections againſt the Witneſſes, and they remit to an *Inqueſt* of 15 choſen men out of 47, to judge what is proven; And this *Inqueſt* may condemn upon their own Knowledge, they being in our Law both Judges and Witneſſes; And if they condemn, *Their Verdict*, (for ſo their Sentence is called) cannot be

be quarrelled, nor they for condemning; But if they absolve after clear Probation led, they may be punished with Infamy, and confiscation of Moveables. Book 4. Tit. 4.

The punishment of *Crimes*, is taken off either by *Remission*, which must pass the *Great Seal*; and must express the greatest Crime *, for which the *Remission* is granted: Or by *Indemnities*, which is a *general Remission* granted by the *King* or *Parliament*; betwixt which two there is this difference, that the obtaining a *Remission* does not free the Obtainer from * *assything the party*, that is to say, *from repairing his losses*; *since its presumed the King does only discharge what belonged to him*, which is, *vindicta Publica*; But not what is the interest of *private parties*, or *vindicta privata*; but because all

*K. J. 4. p. 6. act 62.

*K. J. 2. p. 14. act 74. K. J. 5. p. 3. act 7.

Book 4. Tit. 4. all the people are repreſented in Parliament; the King and Parliament may by their *Indemnity*, diſcharge both the one and the other.

He who founds on a *Rimiſſion* acknowledges the Crime; but he who founds on an *Indemnity* does not.

The King likewiſe reſtores Men ſometimes againſt *Forefaultures*; which *Reſtitution* is either by way of *Juſtice*, *finding that the Perſon was unjuſtly condemned*; and then the Perſon condemned is reſtored to all that ever he had; and he recovers not only his Fame, but his Eſtate; though tranſmitted to third parties*. Or *ſecundo*, the *Reſtitution is by way of Grace, and meer Favour*; and then the Partie condemned cannot recover what was beſtowed by the King upon third parties

*K. J. 6. par. 18. Act 4.

for

for the King cannot recall what was once Legally and Warrantably granted to him. Book 4. Tit. 4.

FINIS.